Dec 23/89 My to claim w aff. Bradley Deere pro confesso on mechanics liens... no app. a demurrer but no certificate
1. alleged that appeal bond is defective 25.000 — word dollars omitted — Deere pro confesso
2 — (but see appellants brief, p. 2
Dem no to claim m. & not aff

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1375. ~~567~~ 525

THE SHEFFIELD FURNACE COMPANY, APPELLANT,

vs.

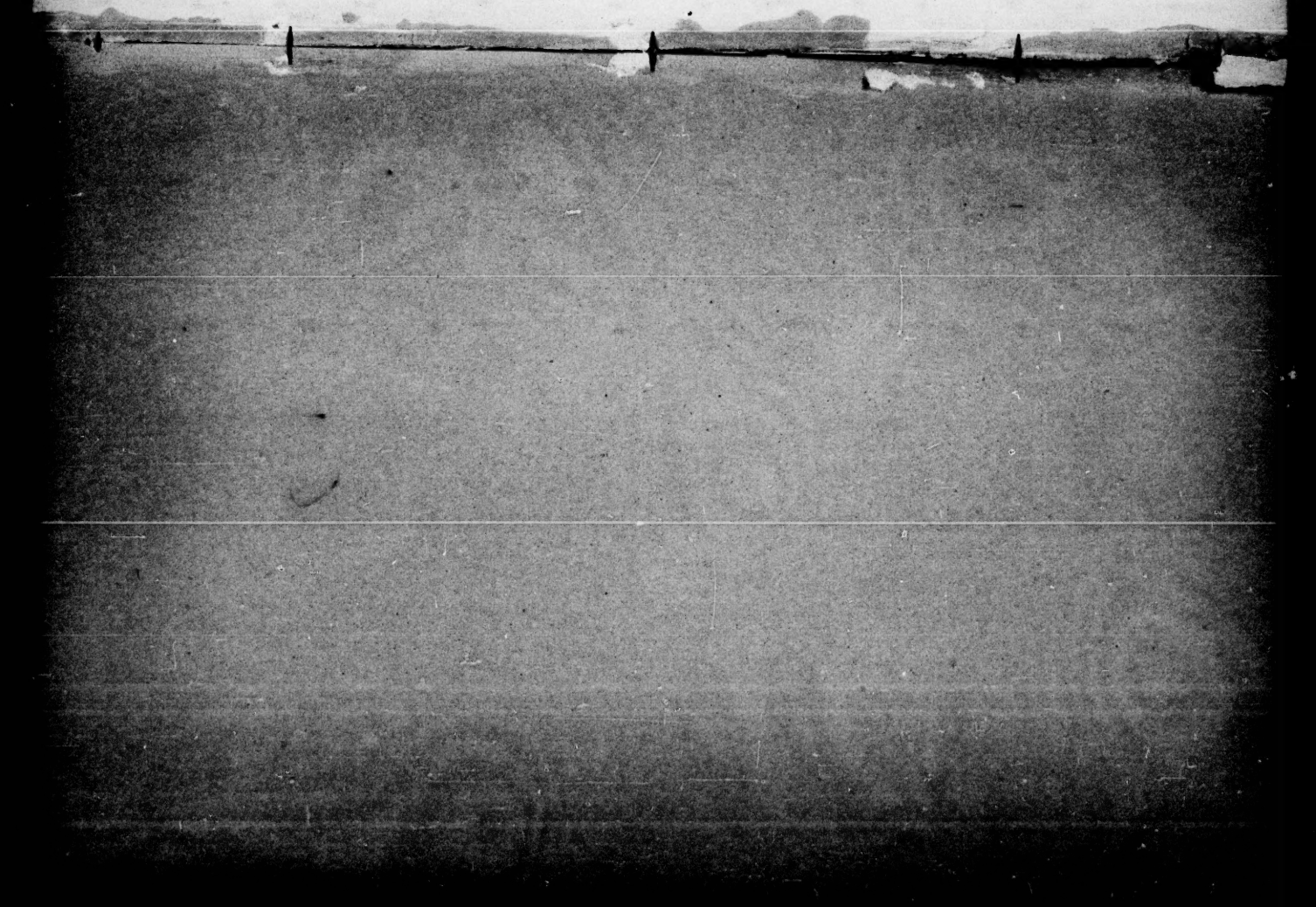
JAMES P. WITHEROW. Compl below

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

FILED OCTOBER 16, 1889.

Jan 4/90 — 149 U S 574

149 U S 574



SUPREME COURT OF THE UNITED STATES.

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vs.

JAMES P. WITHEROW.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

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1 & 2 UNITED STATES OF AMERICA,
Northern District of Alabama, Northern Division, at Huntsville, } ss:

To the honorable judges of the said circuit court for said district and division, having jurisdiction in equity:

James P. Witherow, who avers himself to be a citizen of and residing in the State of Pennsylvania, in the city of Pittsburgh, brings this his bill against the Sheffield Furnace Company, a corporation duly chartered under the laws and a citizen of the State of Alabama, and residing and having its principal office and place of business at Sheffield, in Colbert county, Alabama, in said district and division.

And thereupon your orator complains and says that on the 2nd day of June, 1886, said complainant made and entered into a contract and agreement with said defendant whereby he was to construct for said defendant a certain coke blast iron furnace, at and for the price of one hundred and twenty-four thousand dollars ($124,000.00), upon foundations to be furnished by said defendant, upon its twenty-acre furnace site at Sheffield, Colbert Co., Ala., which said contract and agreement was made and entered into on the 2nd of June, 1886, by said defendant, through its duly authorized officers and agents, and was all reduced to writing, an original of which will be produced at the hearing of this cause, if necessary.

Complainant further sets forth and shows to the court that a further and other written contract and agreement was afterwards entered into, by which he was to construct a stock-house for said furnace, at and for the cost of $7,600, in addition to the price set forth and named in the first-mentioned contract, and that said
3 contract for the erection of the said stock-house was entered into between said parties about the 8th of Nov., 1886, an original of which contract will be produced at the hearing, if necessary.

Complainant further avers and shows to the court that at the special instance and request of the defendant he also placed in said furnace, about the 1st of May, 1888, one extra boiler at and for the price of $4,000, for which boiler defendants were and are bound to pay said complainant, in addition to the amounts hereinbefore stated.

Complainant avers and shows to the court that, in addition to the furnace, stock-house, and the extra boiler aforesaid, at the special instance and request of the defendant, complainant did other and further extra work about said furnace, and paid out and expended other and further monies in the construction and building of said furnace, as such original contractor and furnace-builder, over and above said three last-mentioned items, amounting in the aggregate to about $16,327.76.

Complainant avers and shows to the court that in the making and performing of this said contract with the said defendant he was the original contractor and builder and entitled under and by virtue of the laws and statutes of the State of Alabama, and upon

the completion of the work under his contract, to a lien for all the monies and balances so due him as such original contractor and builder; that the amount due to said complainant after all the allowances and just credits and payments made by the defendant to complainant upon said furnace contract is $63,279.43, besides interest upon the same.

That in pursuance of the said lien laws of the State of Alabama, and within six months after said indebtedness had accrued, to wit, on 27 June, 1888, complainant caused to be made out and
4 filed in the office of the judge of probate of Colbert county, Alabama—that being the county in which the property upon which a lien is sought to be enforced is situated—a statement in writing, verified by the oath of complainant, and containing a just and true account of the demand secured by the lien, after all just credits had been given, and a description of the property upon which said lien is claimed and the name of the owner or proprietor thereof; all of which facts are fully set forth and shown by Exhibit "A," hereto annexed and asked to be made a part of this bill, and to which liberty of reference is prayed as often as may be necessary; and complainant sets forth and shows that under and by virtue of the laws and statutes of Alabama—the lien proceedings so as above set forth instituted in Colbert Co., Alabama—he is entitled to and has as such original contractor and builder a first lien not only upon said furnace itself, but in addition thereto upon either the whole twenty acres of said furnace site (as set forth and shown in said Exhibit "A") or, in any event, upon the one acre upon which said furnace itself is located, complainant having fully complied with his contract for the building of said furnace and with the provisions of the statute of Alabama in establishing his lien, said lien being given to complainant under and by force of secs. 3018 to 3048, inclusive, of the Code of Alabama of 1886, vol. 1. Wherefore complainant, waiving discovery under oath from said defendant, prays this honorable court that an account may be taken by it, or under its direction, of what is due and owing to complainant by said defendant for his principal and interest under said contract as aforesaid, which said amount when so ascertained by said court, or by a master in chancery under its direction, the court will decree full payment of the same shall be made complainant by defendant at a short
5 day therein to be specified, and that upon failure of defendant to pay off and satisfy the amount so to be found due to complainant the aforesaid lien may be foreclosed and all equity of redemption in and to said furnace and such land upon which it is situated as the court shall find subject to the lien of the complainant shall be forever barred, and that a sale may be made under the decree and direction of this court of said furnace and premises to satisfy complainant's debt, free and disincumbered of any and all other liens or mortgages or equity of redemption.

Your orator also prays that a writ of subpœna be issued out of this honorable court, directed to said defendant, The Sheffield Furnace Co., commanding it, at a certain time and under a certain penalty therein to be limited, to be and appear before this honorable court,

then and there full, true, and perfect answer to make to all and singular the premises herein.

And your orator further prays for such general and personal decree against the said defendant, The Sheffield Furnace Co., for such sum as may not be satisfied by the sale of said furnace and the ground upon which it is situated.

Your orator also prays for such other and further general relief, orders, and decrees that shall be meet and equitable.

HENRY B. TOMPKINS,
Sol. for Complainant.

TOMPKINS AND BRANDON, *Of Counsel.*

6 EXHIBIT "A."

THE STATE OF ALABAMA, *Colbert Co.:*

To the honorable probate court of said county:

James P. Witherow, original contractor and blast iron furnace builder, residing at Pittsburgh, in the State of Pennsylvania, claims a lien under sect. 3018 *et sequitur* of the Code of Alabama of 1886, as such original contractor and furnace-builder, upon the iron blast furnace of the Sheffield Furnace Co., a corporation chartered by the laws of Alabama, and which furnace was completed and ready to go into blast on the — day of ——, 1888, and is situated at Sheffield, Colbert Co., Alabama, on the south bank of the Tennessee river, on a site containing about twenty acres, described as follows:

"Twenty acres of land in fractional section 29, township 3, range 11 west, in Colbert Co., Alabama, contiguous to the city of Sheffield, said twenty acres of land lying partly on one side and partly on the other side of a street two hundred feet wide, to be laid off, * * * and bounded on the northwest by the Tennessee river and the Sheffield Landing, on the northeast by Georgia avenue, on the south by

7 a line running from northeast to southwest parallel with and nineteen hundred feet from the west boundary line of the block of land on which is erected the Eureka Brick Works and Planing Mill."

And the said James P. Witherow, original contractor and furnace-builder, also claims a lien not only upon said iron blast furnace and its appurtenances so by him erected upon said furnace site under and by virtue of a contract to construct the same made with said Sheffield Furnace Co., who is the owner and proprietor of said furnace and grounds or site upon which it is built, but said Witherow also claims a lien upon the said grounds and site upon which said furnace and appurtenances is so erected and built.

Said lien is so claimed by reason of an unpaid balance now due to said Witherow as such original contractor and builder by said Sheffield Furnace Company on account of the building and construction of said furnace and the work, labor, material, fixtures, machinery, engines, boilers, and other necessary appliances furnished for and put into said furnace by said Witherow, the amount still

due and unpaid to said Witherow by said Sheffield Furnace Company being the sum of sixty-three thousand two hundred and seventy-nine $\frac{43}{100}$ dollars ($63,279.43), besides interest, which amount is fully set forth and shown in detail by the statement hereto annexed, marked Exhibit "A," containing one page, and made a part of this claim of lien as fully as if the same were embodied in this paper.

JAMES P. WITHEROW.

THOMPKINS & BRANDON,
Att'ys for Pl'ff.

STATE OF ALABAMA, *Jefferson County:*

Sworn to and subscribed before me this 22nd day of May, 1888.
[SEAL.] W. T. POE,
Notary Public.

8 THE STATE OF ALABAMA, *Jefferson County:*

Personally appeared before the undersigned, a notary public in and for said State and county, James P. Witherow, who, on oath, says that the statements in the foregoing paper claiming a lien on the furnace and ground and site on which it is situated and belonging to the Sheffield Furnace Company, of Sheffield, Alabama, are true, and that the account herein set forth against the Sheffield Furnace Company in the exhibit marked "A" is just and true after all just credits have been given, and that the same is due and unpaid.

JAMES P. WITHEROW.

Sworn to and subscribed before me this 22nd day of May, 1888.
[SEAL.] W. T. POE,
Notary Public.

(Endorsed:) Filed in clerk's office this 5th day of Sept., A. D. 1888. A. W. McCullough, clerk.

9 EXHIBIT "A."

PITTSBURGH, PA., *May* —, 1888.

Sheffield Furnace Company in Account with James P. Witherow, Engineer & Contractor.

1888.			
July 22.	To bill rendered, labor on foundations		$42 68
Oct. 26.	" " castings		459 36
26.	" " cash Minor Scovel		1 65
Dec. 4.	" " freight car clay, C. & O., # 774, and unloading 3 cars clay		114 00
1887.			
Jan. 14.	To bill rendered, freight on two cars clay, # 262 & 1014, & exchange		148 75

These cars belonged to the Sheffield Furnace Company, and freight and expenses paid for by us.

Dec.	17.	To protested note	12,111	57
		protest fees	2	50
		costs on note	50	00
	22.	Bill rendered, coke and ore buggies	1,360	00
		To bill rendered, cars for pig metal	130	00
		execution of contract dated 2d June, 1886, furnace	124,000	00
		execution of contract dated 8 Nov, 1886, stock-house	7,600	00
10		To cash, J. R. Baldwin, draft for lumber	400	00
1888.				
Ap'l	26.	Bill rendered for articles furnished Nov. & Dec., 1887, & M'ch, 1888	132	75
May	1.	Extra boiler	4,000	00
	11.	Bill rendered for articles furnished May 5 & 8, 1888	375	00
			151,927	76

CREDIT.

By sundries		87,648	33
Balance due		$63,279	43

Endorsed on back: Filed in office the 27th day of June, 1888, and duly recorded in Book "Y" of M. & L., pages 197, 198, 199, on the 27th day of June, 1888. John A. Steele, judge of probate. Filed in clerk's office this 5th day of Sept., A. D. 1888. A. W. McCullough, clerk.

11 Endorsed: No. 149. In equity. Circuit court of U. S., northern district of Alabama, at Huntsville. James P. Witherow, complainant, and Sheffield Furnace Co., def't. Original bill. (Endorsed:) Filed in the clerk's office this 5th day of Sept., A. D. 1888. A. W. McCullough.

12 The President of the United States of America to the marshal for the northern district of Alabama, Greeting:

You are hereby commanded to summon Sheffield Furnace Company, if to be found in your district, that it, lying aside all excuse, appear personally at the office of the clerk of the circuit court of the northern district of the State of Alabama, northern division, in the city of Huntsville, in said district, on the rule day, to be held on the first Monday in October next, to answer, plead, or demur to the bill of complaint exhibited in said circuit court by James P. Witherow, complainant, against Sheffield Furnace Company, defendant, a copy of which bill will be furnished on application to the clerk.

Herein fail not, and have you then and there this precept, with your return thereon endorsed.

Witness the Hon. Samuel P. Miller, senior associate justice of the Supreme Court of the United States, having precedence, the Chief Justiceship being vacant, this first Monday of April, in the year of

our Lord one thousand eight hundred and eighty-eight, and of American Independence 112th year.

Attest: A. W. McCULLOUGH,
Clerk of the U. S. Circuit Court.

Issued 5th day of Sept., A. D. 1888.

13 MEM.—The defendant is to enter its appearance and to file its answer or demurrer to said bill in the clerk's office on or before the day on which this writ is returnable; otherwise a decree *pro confesso* may be entered.

The marshal is required to execute this writ twenty days before the return day thereof.

The marshal, by direction of complainant's solicitor, will make service upon Alfred H. Moses, Esq., president of Sheffield Furnace Company, at Sheffield, Ala.

(Endorsed:) No. 149. U. S. circuit court. In chancery. James P. Witherow *vs.* Sheffield Furnace Co. Subpœna. In equity. Original. Returned and filed Sept. 7th, 1888. A. W. McCullough, clerk.

14 I hereby deputize and appoint J. D. Chadwick specially to execute the within process.

Huntsville, Sept. 5th, 1888.

A. H. KELLER, *U. S. M.*

Further endorsed: Received at marshal's office this 5th day of Sept., 1888. A. H. Keller, U. S. M.

Further endorsed: Executed this sixth day of Sept., 1888, by sending a copy of the within writ on def't and delivering it to Alfred H. Moses, president of said company, at hi sresidence, in Sheffield, Ala. A. H. Keller, United States marshal, by J. D. Chadwick, special deputy.

Further endorsed: No. 149. U. S. circuit court. In chancery. James P. Witherow *vs.* Sheffield Furnace Company. Original.

Further endorsed: Returned and filed September 7th, 1888. A. W. McCullough, clerk.

14½ JAMES P. WITHEROW
vs.
THE SHEFFIELD FURNACE COMPANY. } In Equity.

The defendant, The Sheffield Furnace Company, applied for and received a copy of the original bill of complaint in this cause previous to the 1st day of Oct., 1888.

A. W. McCULLOUGH, *Clerk.*

15 In the Circuit Court of the United States for the Northern District of the Northern Division of Alabama. In Equity.

JAMES P. WITHEROW, Complainant,
vs.
THE SHEFFIELD FURNACE COMPANY, Defendant.

Comes the defendant in the above-entitled cause, by its solicitors, and demurs to the bill of complaint filed therein, and for causes of demurrer assigns the following grounds, viz:

I. That said bill is wanting in equity in this, that said bill alleges that the furnace mentioned therein as constructed by the complainant for the defendant was constructed under a certain contract in writing dated June 2nd, 1886, but said bill fails to aver or show what the terms of said contract were, so that it may be ascertained from said bill whether the work and construction for which complainant claims the lien upon the property of the defendant was done in accordance with the terms, stipulations, and provisions of said contract, or whether any of the terms of said contract were complied with by said complainant.

II. That said bill is wanting in equity in this, that said bill alleges that the stock-house for said furnace mentioned therein as constructed by the complainant for the defendant was constructed under a certain contract in writing dated about Nov. the 8th, 1886, but said bill fails to show or allege what the terms of said contract were, so that it may be ascertained from the said bill whether the work and construction for which camplainant claims a lien upon the property of the defendant was done in accordance with the
16 terms, stipulations, and provisions of said contract, or whether any of the terms of said contract were complied with by said complainant.

III. That said bill of complaint fails to allege any certain or sufficient description of the lands mentioned as the site of said furnace, whether the said site consists of twenty acres or one acre, as is required by law for the enforcement of a builder's or contractor's lien.

IV. That said bill is wanting in equity in this, that it shows on its face that said furnace and stock-house were built and constructed in a town or city, to wit, at Sheffield, county of Colbert and State of Alabama, but said bill fails to show that said complainant filed the verified statement necessary by the statutes of the State of Alabama to obtain a contractor's lien, in this, that said bill nowhere alleges that said complainant made any selection of any lot in said town or city on which said furnace and stock-house or either of them was built at or before the filing of the statement in the office of the probate judge of said Colbert county, Alabama, required by law, or that in such statement alleged by complainant to have been so filed he described any lot in said city or town of Sheffield which should be subject to a contractor's lien.

V. The said bill is wanting in equity in this, that it shows on its face

that said furnace and stock-house were built and constructed either in a town or city or village, or not in a town, city, or village,
17 but said bill fails to show that said complainant at any time prior to filing his statement in the office of the judge of probate required by law to select the one acre not in a city, town, or village which shall be subject to the lien claimed by him, or that in the verified statement required by law to be filed in the office of the judge of probate of the county in which said property was situated he gave any description of the lot in a city, town, or village on which the lien was claimed.

VI. That said bill is indefinite and uncertain in this, that it fails to show whether the site on which said furnace and stock-house were built was a lot in a city, town, or village, or was not in a city, town, or village, and fails to show that the statement required by law to be filed in the office of the judge of probate contained any description of the lot in a city, town, or village, or of any one acre not in a city, town, or village, on which said property was situated which shall be subject to the lien claimed by complainant.

RAULHAC AND NATHAN,
Sol's for Defendant.

Endorsed: No. 149. In the circuit court of the United States for the northern division of the northern district of Alabama. James P. Witherow *vs.* Sheffield Furnace Company. Demurrers of defendant.

Further endorsed: Filed in clerk's office this 3rd day of Oct., 1888. A. W. McCullough, clerk.

18 In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

JAMES P. WITHEROW, Complainant,
vs.
SHEFFIELD FURNACE COMPANY, Defendant. } 149. In Equity.

At rules, first Monday in November, being the fifth day thereof, A. D. 1888.

The subpœna issued in the above cause on the 5 day of September, A. D. 1888, which was duly served on the 6th day of September, 1888, having been returned, which return has been filed, and it appearing therefrom that the said subpœna was so served duly on the defendant herein, Sheffield Furnace Company, by the delivery of a copy thereof to Alfred H. Moses, who is shown to the clerk to be the president of the defendant company and was such president at the time of said service, and no appearance having been entered on the part of the said defendant, or plea, answer, or demurrer filed, as by law and the rules of this court provided: therefore, on motion of Lawrence Cooper, one of complainant's solicitors, it is ordered and decreed that the bill herein be taken *pro confesso* as to said defendant, Sheffield Furnace Company.

(S'g'd) A. W. McCULLOUGH, *Clerk.*

Endorsed: Decree *pro confesso.*

19 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Northern District and Division of Alabama, at Huntsville, Alabama. In Equity.

JAMES P. WITHEROW
vs.
SHEFFIELD FURNACE COMPANY.

And now comes the complainant in the above-stated cause and amends his original bill therein as follows:

Complainant avers and shows to the court that the city of Sheffield, in Colbert county, was duly incorporated by an act of the General Assembly of the State of Alabama, entitled an act to incorporate the city of Sheffield, in the county of Colbert, which said act was approved Feb. 17th, 1885, and is to be found in the acts of the General Assembly of the State of Alabama for the year 1884–'85, on pages 781 to 810, inclusive, and which act is hereby specially pleaded and shown to the court.

Complainant further avers and shows to the court that under the provisions of said act, and by reference to a map of the city of Sheffield, made by Charles Boeckh, C. E,, on file in the office of the judge of probate of Colbert county, and which map is specially referred to in said act of the Legislature, that the twenty acres of land set forth and referred to in complainant's original bill of complaint as being the site upon which the furnance of the Sheffield Furnance Company is situated, for a part of said ground so referred to and set forth
20 on said map as constituted the city of Sheffield, and that the said twenty acres so being the furnace site aforesaid was and is subject to the jurisdiction and control of the authorities of the city of Sheffield.

And complainant further avers and shows to the court that said furnace, stock-house, and other buildings and appurtenances connected with said furnace and forming a part of the same are situated about the middle of said twenty acres, as set forth and described in said bill of complaint, and that said furnace and appurtenances extend over and occupy more than one acre of land, and that said twenty acres of land so forming the site of said furnace is necessary for the convenient and profitable operation of said furnace, and without the whole of said twenty acres the said furnace could not be operated in such a manner as to make the property remunerative.

Wherefore complainant prays as set forth in the original bill of complaint.

HENRY B. THOMPKINS,
Of Thompkins and Brandon, Sol. for Complainant.

Endorsed: No. 149. In the United States circuit court for the northern district and northern division of Alabama. James P. Witherow *vs.* Sheffield Furnace Company. Amended bill in equity. Filed in clerk's office this 14th day of Nov., 1888. A. W. McCullough, clerk.

2—1375

Further endorsed: The filing of this amended bill is erroneous, and the same is withdrawn, no order of the court having been obtained ordering the filing thereof. Henry B. Thompkins, sol. for complainant.

21 In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama, at Huntsville. October Term, 1888. In Equity.

JAMES P. WITHEROW, Complainant,
vs.
THE SHEFFIELD FURNACE COMPANY, Defendant.
} Bill for Foreclosure of Contractor's Lien on Realty and Buildings Erected Thereon.

Final Decree.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

Upon appearance and motion of complainant's solicitor, upon the whole record being exhibited, and showing that service had been duly made on the defendant, and a decree *pro confesso* had been regularly taken, and that no appearance had been made or defence offered by defendant, and upon the proofs submitted, it is ordered, adjudged, and decreed that the allegations in the pleadings of complainant are found to be true, and that complainant, James P. Witherow, as the original contractor and furnace-builder, has a valid lien upon the furnace site of twenty acres and the iron blast furnace, stock-house, improvements, fixtures, and property thereon situated, lying, and belonging, said twenty acres being described as follows:

Twenty acres of land in fractional section 29, township 3, range 11 west, in Colbert county, Alabama, contiguous to the city of Sheffield, said twenty acres of land lying on one side and partly on the other side of a street two hundred feet wide, to be laid off,
22 and bounded on the northwest by the Tennessee river and the Sheffield Landing, on the northeast by Georgia avenue, on the south by a line running from northeast to southwest, parallel with and nineteen hundred feet from the west boundary line of the block of land on which is erected the Eureka Brick Works and Planing Mill.

The court further finds, upon the record and proofs submitted, that the amount due to said James P. Witherow by the Sheffield Furnace Company aforesaid is the sum of sixty-three thousand two hundred and seventy-nine & $\frac{43}{100}$ dollars ($63,279.43), with interest, at the rate of eight per centum per annum, on that sum from the eleventh day of May, 1888, which amounts on this date to the aggregate sum of sixty-six thousand three hundred and forty-four & $\frac{31}{100}$ dollars. It is therefore ordered, adjudged, and decreed by the court that the defendant, The Sheffield Furnace Company, do pay to said James P. Witherow or his solicitors of record herein said sum of sixty-six thousand three hundred and forty-four $\frac{31}{100}$ dollars (which

said sum shall bear interest from date hereof until paid) on or before the 20th day of January, 1889, in which event and upon such payments being made the lien of said Witherow shall be discharged from the aforesaid property of defendant.

But, in default of such payments by said defendant on or before the aforesaid date last above written, that then and in that event the said lien of said complainant shall be and become absolutely foreclosed and established against the aforesaid twenty acres of land and the buildings and appurtenances thereon erected, and
23 against all equity of redemption and other right of the defendant of, in, or to the said twenty acres and the buildings and appurtenances thereon erected or in anywise appertaining, and that upon such foreclosure so becoming absolute the clerk of this court is hereby appointed special master and is directed to take possession of all of said property, and shall, upon request of complainant's solicitor, proceed and advertise and sell said twenty acres and appurtenances in conformity with the rules and regulations governing the sale of premises upon which a mortgage deed has been duly foreclosed by process and decree of this court, such sale to be made in front of the court-house door in the city of Huntsville, State of Alabama, after having giving thirty days' notice, once a week for four weeks, in a newspaper published in the city of Huntsville aforesaid; such sale to be to the highest bidder for cash, and upon payment of the purchase-money bid at such sale the clerk and master will execute a deed to the purchaser conveying all right, title, and interest that the defendant, The Sheffield Furnace Company, has in and to said property, and shall place such purchaser in possession of said property sold, and shall report his action in the premises to the next term of this court.

It is further ordered, adjudged, and decreed that the defendant do pay all costs of this cause, to be taxed by said clerk and master, for which let execution issue.

Dec'r 19th, 1888.

JOHN BRUCE, *Judge.*

24 Endorsed: No. 149. James P. Witherow *vs.* Sheffield Furnace Company. Final decree.

Further endorsed: Filed Dec'r 19th, 1888. A. W. McCullough, clerk.

25 THE STATE OF ALABAMA, *Colbert County:*

To the honorable probate court of said county:

James P. Witherow, original contractor and blast-iron furnace-builder, residing at Pittsburgh, in the State of Pennsylvania, claims a lien under section 3018 *et sequitur* of the Code of Alabama of 1886, as such original contractor and furnace builder, upon the iron blast furnace of the Sheffield Furnace Company, a corporation chartered by the laws of Alabama, and which furnace was completed and ready to go into blast on the — day of ——, 1888, and is situated at Sheffield, Colbert county, Alabama, on the south bank of the Ten-

nessee river, on a site containing about twenty acres, described as follows:

"Twenty acres of land in fractional section 29, township 3, range 11 west, in Colbert county, Alabama, contiguous to the city of Sheffield, said twenty acres of land lying partly on one side and partly on the other side of a street two hundred feet wide, to be laid off, * * * and bounded on the northwest by the Tennessee river and the Sheffield Landing; on the northeast by Georgia avenue; on the south by a line run-
26 ning from northeast to southwest, parallel with and nineteen hundred feet from the west boundary line of the block of land on which is erected the Eureka Brick Works and Planing Mill." And the said James P. Witherow, original contractor and furnace-builder, also claims a lien not only upon said iron blast furnace and its appurtenances so by him erected upon said furnace site, under and by virtue of a contract to construct the same made with said Sheffield Furnace Company, who is the owner and proprietor of said furnace and grounds or site on which it is built, but said Witherow also claims a lien upon the said grounds and site upon which said furnace and appurtenances *is* so erected and built.

Said lien is so claimed by reason of an unpaid balance now due to said Witherow, as such original contractor and builder, by said Sheffield Furnace Company on account of the building and construction of said furnace and the work, labor, material, fixtures, machinery, engines, boilers, and other necessary appliances furnished for and put into said furnace by said Witherow, the
27 amount still due and unpaid to said Witherow by said Sheffield Furnace Company being the sum of sixty-three thousand two hundred and seventy-nine $^{43}_{100}$ dollars ($63,279.43), besides interest, which amount is fully set forth and shown in detail by the statement hereto annexed, marked Exhibit "A," containing one page, and made a part of this claim of lien as fully as if the same were embodied in this paper.

JAMES P. WITHEROW.

TOMPKINS & BRANDON,
Att'ys for Pl'ff.

STATE OF ALABAMA, *Jefferson County:*

[SEAL.] Sworn to and subscribed before me this the 22nd day of May, 1888.

W. T. POE,
Notary Public.

THE STATE OF ALABAMA, }
Jefferson County. }

Personally appeared before the undersigned, a notary public in and for said State and county, James P. Witherow, who on oath says that the statements in the foregoing paper, claiming a lien on the furnace and grounds and site on which it is situated, and belonging

to the Sheffield Furnace Company, of Sheffield, Alabama, are
28 true, and that the account herein set forth against the Sheffield Furnace Company in the exhibit marked "A" is just and true after all just credits have been given, and that the same is due and unpaid.

JAMES P. WITHEROW.

[SEAL.] Sworn to and subscribed before me this 22 day of May, 1888.

W. T. POE,
Notary Public.

29 EXHIBIT "A."

PITTSBURGH, PA., *May* —, 1888.

Sheffield Furnace Company in Account with James P. Witherow, Engineer & Contractor.

1886.			
July 22.	To bill rendered, labor on foundations		$42 68
Oct. 26.	" " " castings		459 36
" 26.	" " cash, Minor Scovel		1 65
Dec. 4.	" " freight car clay, C. & O., #774, and unloading 3 cars clay		114 00
1887.			
Jan. 14.	" " freight on two cars clay, #262 & 1014, & exchange		148 75
	These cars belonged to the Sheffield Furnace Co., and freight and expenses paid for by us.		
Dec. 17.	To protest note		12,111 57
	protest fees		2 50
	costs on note		50 00
22.	Bill rendered, coke & ore buggies		1,360 00
22.	To bill rendered, cars for pig metal		130 00
22.	Execution of contract dated 2d June, 1886—furnace		124,000 00
22.	Execution of contract dated 8 Nov., 1886—stock-house		7,600 00
	To cash, J. R. Baldwin, draft for lumber		400 00
1888.			
Ap'l 26.	Bill rendered for articles furnished Nov. & Dec., 1887, & M'ch, 1888		132 75
May 1.	Extra boiler		4,000 00
11.	Bill rendered for articles furnished May 5 & 8, 1889		375 00
Credit			151,927 76
By sundries			87,648 33
Balance due			$63,279 43

30 Endorsed: In the probate court of Colbert county. James P. Witherow *v.* Sheffield Furnace Co. Lien of contractor & furnace-builder. Filed in office the 27th day of June, 1888, and duly recorded in Book "Y" of M. & L., pages 197, 198, 199, on the 27 day of June, 1888. John A. Steele, judge of probate. Fee, $1.50. Tompkins & Brandon, att'ys for pl'ff.

31 *Proposition.*

J. P. Witherow, engineer.

PITTSBURGH, PA., *May 27th*, 1886.

Sheffield Furnace Company, Sheffield, Alabama.

GENTLEMEN: We will erect on foundations furnished by you the following-described work, as per specifications herewith attached and plans submitted, for the sum of $124,000.00 (one hundred and twenty-four thousand dollars).

1 blast furnace, 17′ base, 75′ high.

3 Whitwell fire-brick stoves, fitted with central combustion chamber, 18′ x 50′.

1 wro't-iron chimney lined to 8′ clear way, 160′ high.

3 Heine patent water-tube boilers, guaranteed to furnish ample steam for the plant.

2 blowing engines, each 36″ steam cyl., 84″ blast cyl., 48″ stroke.

1 duplex steam-pump, 20″ steam cyl., 14″ water cyl., 12″ stroke.

1 duplex steam-pump, 12″ steam cyl., 7″ water cyl., 10″ stroke.

2 feed-water heaters, each 36″ diameter 120″ high, with brass tubes.

1 hoist tower, wro't iron, equipped with 10″ x 10″ hoisting engines.

1 wro't-iron shed, 36′ x 45′ x 20′, forming boiler-house.

1 brick building, 38′ x 56″ x 36′, engine-house.

1 wro't-iron tank, 41′ x 59′ x 4′, forming roof engine-house.

32 1 brick building with iron roof 50′ x 150′ x 25′, cast-house.

All steam and water fittings complete.

The above comprises blast furnace complete, ready for operation, except foundations, flues, stock-house (and main water-supply pipe from source of supply to pump), all of which will be supplied by the Sheffield Furnace Company.

The above proposition does not include royalty on fire-brick stoves.

Terms of payment and acceptance of work as follows:

Payments to be in monthly estimates as work progresses, to the amount of $80,000.00, the balance to be carried a reasonable time.

Or the payments and amount to be carried to be made mutually agreeable, with approved security, said security to be either a mechanic's lien or first mortgage on all the furnace company's interests in Sheffield on the completion of said blast furnace, at my option.

(Signed) JAMES P. WITHEROW.

Upon completion of above contract a careful examination
33 will be made and a thorough test in all particulars effected, which proving satisfactory, the work is to be taken off our hands and settlements made; but should any defects appear, and which is unquestionably one of construction, we will feel ourselves bound to put it in thorough order, but we must be relieved from consequential damages.

It is expected you will have an inspector constantly on the ground to carefully inspect the material and examine the work as it progresses, and should any work or material be deemed objectionable notice thereof must be given us at once.

Respectfully submitted, JAMES P. WITHEROW.

Acceptance.

The above proposal is hereby accepted this 2nd day of June, 1886, in all its particulars, including the terms of payment.

HORACE WARE,
HENRY B. TOMPKINS, } *Ex. Com.*
ALF'D H. MOSES,

34 James P. Witherow, successor to Witherow & Gordon, engineer & contractor, furnace construction & mill machinery, general agents for Whitwell hot-blast stoves.

BIRMINGHAM, ALA., *Nov.* 8, 1886.

Southern office Sheffield Furnace Co., Sheffield, Ala.

GENTLEMEN: We will furnish and erect for you upon your foundations at Sheffield, Ala., one wooden stock-house, 75 ft. span center to center posts and 150 ft. long, with ventilator 14 ft. wide, 6 ft. high, and 150 ft. long, roofed with # 22 corrugated or crimped iron, & 20 ft. of the sides & ends sheeted with the same, all a substantial & well-made job, including flooring 1½″; also the trestle-work appertaining to the stock-house, viz., 550 ft. lineal (37 cents) of 16-ft. trestle; 550 ft. lineal (37 cents) of trestle varying from 4–14 ft., not including ties for the railroad track, all, together with the bolts & wro't-iron work necessary, for the sum of seven thousand six hundred dollars ($7,600). Terms, $2,800 upon delivery of timber for stock-house, & $2,800 at completion of same, & $1,000 at delivery of trestle timber, & $1,000 at completion of same. As this estimate is based on having the timber delivered @ furnace site @ $15
35 per thousand ft., B. M., you are to pay us the extra cost, if any, above $15 per M. on all timber required for this work.

Very truly yours, JAMES P. WITHEROW,
By MINOR SCOVEL, *Agent.*

Accepted.
HORACE WARE,
Pres't S. Fc. Co.

Endorsed: Contract. Sheffield Furnace Co. Stock-house.

36 SHEFFIELD, COLBERT CO., ALA., *May* 21, '88.

I, Ogden Street, superintendent of the Sheffield Furnace Company, do hereby certify that James P. Witherow, of Pittsburgh, Pa., the contractor to build said furnace, has complied with his contract, and that said furnace was finally completed and ready to go into blast and turned over to the company by said contractor on the 24 day of April, 1888.

OGDEN STREET, *Sup't.*

37 UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of the United States of the Northern Division of Alabama, at Huntsville, Alabama. In Equity.

JAMES P. WITHEROW, Complainant,
vs.
SHEFFIELD FURNACE COMPANY, Defendant.

In this cause, upon petition and motion of the defendant in the above-stated cause to set aside the final decree rendered in said cause on the 19th day of Dec., 1888, and the same coming on now to be heard before the Honorable John Bruce, judge of said circuit court for the district and division aforesaid, in equity—

At chambers, on this the 2nd day of Feb., 1889, and the same being duly considered by the court, it is ordered, adjudged, and decreed that the said defendant, Sheffield Furnace Company, have, and is hereby, granted leave to file the said motion and petition in the said circuit court for the district and division aforesaid, in equity, and that the said motion and petition be heard and considered before the Hon. John Bruce, judge of said court, in the district and division aforesaid, at chambers, in the city of Montgomery, Alabama, on Thursday, the 14th day of Feb., 1889, at 11 o'clock a. m. of said day, when and where the said complainant may appear and contest the same; and it appearing to the court that it is proper that notice of said petition and motion should be given to the solicitors or solicitor of record of the said complainant, it is therefore ordered that the clerk of said circuit court of the United States for the district and division aforesaid, in equity, forthwith, upon the filing of said petition and motion of said defendant and of this order, issue
38 notice to the solicitors or solicitor of record of said complainant of the hearing of said petition and motion at the time and place hereinabove mentioned.

Given under my hand and dated at chambers on this the 2nd day of Feb., 1889.

JOHN BRUCE, *Judge.*

Endorsed: James P. Witherow *vs.* Sheffield Furnace Company. Order granting leave to file petition and motion.

(Endorsed:) Filed in clerk's office 4th day of Feb., 1889. A. W. McCullough, clerk.

39 UNITED STATES OF AMERICA:

In the Circuit Court of the Northern Division of the Northern District of Alabama, at Huntsville, Alabama. In Equity.

To the Honorable John Bruce, judge of the said circuit court of the United States for said division and district, having jurisdiction in equity:

The motion and petition of Sheffield Furnace Company, a body corporate under the laws of the State of Alabama, respectfully shows and represents unto your honor that on the 5th day of September, 1888, one James P. Witherow filed his bill of complaint in the circuit court of the United States in the district and division aforesaid, in equity, against your petitioner, Sheffield Furnace Company, body corporate as aforesaid, which cause is numbered 149 on the docket of said circuit court, in equity, and on the said 5th day of September, 1888, a subpœna in equity was issued in said cause, attested by the clerk of said court, to your petitioner, and on the 6th day of September, 1888, the said subpœna was served upon the president of your petitioner by the marshal of said district and return thereof by him made to said court; that the next rule day after said service and the appearance day named in said subpœna was the first Monday in October, 1888, which was the first day of Oct., 1888; that on the third day of October, 1888, your petitioner, by its solicitors, filed in the office of the clerk of the said circuit court, in equity, demurrers to said bill in equity, which said demurrers were, in the opinion of its counsel, well founded in point of law, and which were not interposed for delay; that by inadvertent and not from any intentional neglect no appearance was formally entered for your petitioner as defendant to said bill, and for the same reason no certificate filed by counsel; that in his opinion said demurrers were well founded in point of law nor any affidavit made and filed by your petitioner that said demurrers were not interposed for delay; that on the first Monday, being the 5th day of November, 1888, a decree *pro confesso* was entered on the order book by the clerk of said circuit court, in equity, against your petitioner upon the ground that no appearance had been entered for it as defendant to said bill, or plea, answer, or demurrer filed as provided by law and the rules of this court. Your petitioner shows that petitioner had taken a copy of said bill in said cause out of the clerk's office before said 3rd day of October, 1888, and before said decree *pro confesso* of November 5th, 1888; that after said 5th day of November, 1888, and after said copy of said bill had been taken out of the clerk's office, on, to wit, the 14th day of November, 1888, said complainant in said bill, James P. Witherow, amended his said bill in a material point, in this, that by said original bill it was alleged by said complainant therein that the land on which said complainant had a lien as an original contractor and builder of a certain iron blast furnace and other structures was in Colbert county, Ala., contiguous to the city of Sheffield, and did not alledge that the same was in any city, town, or village, which allegations under the statutes and

40

laws of the State of Alabama, under and by virtue of which complainant claims the lien asserted by him in his
41 said bill, would have entitled the said complainant, if true, to a lien, if he was in fact entitled to have or claim any lien whatsoever on the land of your petitioner, the defendant in said cause, of one acre in area, while by said amendment said complainant alledged that the land on which the furnace and structure erected by him is situated was an entire lot or parcel of land twenty acres in area and was in a city, town, or village, in this, that said twenty-acre parcel was in the city of Sheffield, Colbert county, and State of Alabama; and your petitioner avers and shows to your honor that said amendment contradicted and was inconsistent with the declaration or statement for a contractor's and builders' lien filed by said complainant, James P. Witherow, in the office of the probate judge of said Colbert county, State of Alabama, exhibited with his said bill, without which said complainant could have or enforce no lien as a contractor and builder of said furnace and structures, in which said statement it is declared that said parcel of land was twenty acres of land in fractional section 29, township 3, range 11 west, in Colbert county, Alabama, contiguous to the city of Sheffield; and your petitioner avers and shows to your honor that the said complainant in said cause did fail to furnish without delay and has at all times failed to furnish to the defendant to said cause, your petitioner, a fair copy, or any copy of any kind or description whatsoever, of said amendments, with suitable references to the places where the same are to be inserted; and your petitioner avers that the matters alledged and set forth in said amendments to said bill are not true in point of fact, and that your petitioner, if furnished with a copy of said amendments, as required by the rules of this court, or in any manner notified of the matters therein al-
42 ledged, could have shown in its behalf that such matters were and are untrue in fact, and that the complainant in said bill was not entitled to and should not have had decreed to him a lien, as asserted by him in said amendments, on all of said twenty-acre parcel of land, or that if complainant was entitled to any lien in any manner or to any extent upon said land he was duly entitled to such lien upon one acre in area thereof under said statutes of the State of Alabama.

And your petitioner further avers and shows that the final decree of this honorable court, subsequently rendered, as hereinafter shown, upon said bill of said complainant as so amended, was erroneous, illegal, and void, contrary to rule 28 of the rules of practice established by the courts of equity of the United States, and should be set aside and vacated by this court.

Your petitioner further shows and avers that no decree *pro confesso* was ever taken or entered upon the order book of said circuit court, in equity, upon said amendments or upon said bill as amended, and that said cause numbered 149 as aforesaid was never put at issue upon said bill as so amended.

Petitioner further shows that the regular October term of 1888 of said circuit court of the United States for the district and divis-

ion aforesaid, at Huntsville, Alabama, was not held at the time appointed by law therefor, by reason of the prevalence of an epidemic in the section of country in which the sittings of said court are held and the existence of quarantine regulations therein, which would have prevented attendance of parties and witnesses on the sittings of said court, and that an adjourned term of said court was held in the said city of Huntsville on the third Monday of December, 1888; that petitioner is informed and believes
43 and so states one of the counsel for this defendant was informed by the judge of said court that no civil business would be transacted or civil causes heard at such adjourned term, but only the criminal docket of said court acted on at such adjourned term; that when said adjourned term was held petitioner is informed and believes and so states one of the counsel for petitioner went to said court at said city of Huntsville for the purpose of attending to this case if any civil causes were called or heard by said court, but it was announced by said court or the judge thereof that no civil causes would be heard at such term of said court, when said counsel left said city of Huntsville and proceeded to his home, at Sheffield, Alabama; but your petitioner shows that on the 19th day of December, 1888, the said court at such adjourned term, on motion of complainant's solicitor, called said case of James P. Witherow against Sheffield Furnace Company, your petitioner, and upon the docket of said circuit court, in equity, numbered 149, and upon said bill as amended, decree *pro confesso* on said original bill and proof, without any notice or copy of said amendments to the defendant in said cause, and without any decree *pro confesso* rendered or entered in the order book of said court on said amendments, and without putting said bill as amended at issue, rendered a final decree establishing the lien claimed by the said complainant, James P. Witherow, foreclosed the same, and ordered the property described in said original bill sold for the satisfaction of said lien; all of which said matters, pleadings, proceedings, and decrees will more fully appear from a certified and attested copy
44 of the record in the said cause of James P. Witherow against Sheffield Furnace Company in said circuit court of the United States, in equity, hereto attached, marked Exhibit A, and prayed to be made a part of this petition and motion.

Your petitioner further shows unto your honor that under said above-mentioned final decree the clerk of the said circuit court of the United States for the district and division aforesaid, in equity, who is by said decree appointed special master for that purpose, has advertised the twenty-acres, parcel of land described in said original bill and in said original decree, with the iron blast furnace, structures, and improvements thereon, for sale on the 25th day of February, 1889, in front of the court-house door, in the city of Huntsville, State of Alabama, to the highest bidder, for cash.

Your petitioner further shows unto your honor that said final decree is, and any sale by virtue thereof would be, illegal and void, in this, that said circuit court of the United States for said district and division, in equity, was without jurisdiction to hear and determine the cause made and presented by said James P. Witherow against

Sheffield Furnace Company, numbered 149 on the docket of said court in equity, and without jurisdiction to declare and enforce the lien asserted in said bill in said cause, for the reason and upon the ground that said bill alleges and shows upon its face, and the facts therein alleged are in nowise in said record controverted, that the
45 contracts for the erection and building of the iron blast furnace and structures in said bill mentioned and described was made and entered into by said James P. Witherow and your petitioner, Sheffield Furnace Company, on the 2nd day of June, 1886, on the 8th day of November, 1886, and on the first day of May, 1886; that the only lien claimed by the said James P. Witherow or asserted by him in his said bill was and is under and by force of the statutes and laws of the State of Alabama, in which State said property on which said building and construction was done and made is situated, and that said lien, if any the said James P. Witherow at any time had or now has upon the said land and buildings and structures in said bill mentioned and described, was created and is regulated and governed by the statutes and laws of the said State of Alabama in force and existed at the time said contract was made, and has no other force, extent, or operation than is conferred and limited by said statutes and laws of the said State of Alabama so in force at the time of the making of said contract; that on the said 2nd day of June, 1886, and 8th day of November, 1886, and said first day of May, 1886, the respective times at which by said bill said contracts are alleged to have been made and entered into by said James P. Witherow and said Sheffield Furnace Company, the lien conferred by the statutes and laws of the State of Alabama upon original contractors and builders, as the said James P. Witherow in his said bill in said cause alleges and claims that he is, who shall do or perform any work or labor upon or furnish any materials for any buildings, erection, or improvement upon land was a special statutory and particular lien, with a special and specific remedy and mode
46 of enforcement provided in and by the statutes by which said lien was created; that the specific statutory remedy and mode of enforcement of such lien provided by the statutes of the State of Alabama on said 2nd day of June, 1886, and 8th day of November, 1886, and said first day of May, 1886, the times at which said lien of said James P. Witherow, asserted in his said bill, if any be had and required, was by a particular action and proceeding at law in courts of common-law jurisdiction and which was exclusive of any bill or proceeding in a court of equity; all which said statutes and laws of the State of Alabama are contained and found in the Code of Alabama, adopted by the General Assembly of Alabama on the 2nd day of February, 1877, commonly styled the Code of Alabama of 1876, at sections 3440 to 3461 thereof, both inclusive, wherein said statutes are hereby pleaded as a part of this petition and motion; that said statutes, as constructed by the court of last resort in said State of Alabama, limit the enforcement of said lien asserted by said complainant in his said bill to actions and proceedings in courts of common-law jurisdiction and to exclude any jurisdiction of courts of equity jurisdiction to enforce the same, and your petitioner alleges

and shows that the said circuit court of the United States for the district and division aforesaid, sitting in equity, was and is wholly without jurisdiction to enforce the lien asserted by said James P. Witherow in said cause or to entertain any bill or proceeding in equity to create or enforce the same.

47 Your petitioner further represents and shows unto your honor that said final decree rendered in said cause on the 19th day of December, 1888, is on its face erroneous, illegal, and void, in this, that by said decree it is ordered and declared that the complainant in said cause, said James P. Witherow, as the original contractor and furnace-builder, has a valid lien upon the furnace site of twenty acres, and the iron blast furnace, stock-house, and all other buildings, erections, houses, improvements, fixtures, and property thereon situated, lying, and belonging, said twenty acres being described as follows: Twenty acres of land in fractional section 29, township 3, range 11 west, in Colbert Co., Alabama, contiguous to the city of Sheffield, and said property so described is ordered by said decree to be sold on default by your petitioner for the payment of the amount for which said lien is declared; that said land is described as "contiguous to the city of Sheffield," which is "near or adjacent to" but not in said city of Sheffield, and is described as twenty acres; that neither by the statutes of the State of Alabama existing and in force at the time of said contract *were* made between said complainant and your petitioner, as shown by section 3440 of the aforesaid Code of Alabama of 1876, nor by the statutes of said State now in force therein, as shown by section 3018 of the Code of Alabama of 1886, to which reference is hereby made as a part of the pleadings in this petition and motion, and under which statutes the lien of said complainant is brought and claimed by his said bill, is any lien conferred or created upon any land on which the building or improvement for which a lien is given is situated

48 greater or more than one acre in area, if said land is not in a city, town, or village.

Your petitioner further shows unto your honor that the land on which the building and improvements on which the complainant in his bill claims and said decree confers a contractor's lien are situated is described in said original bill and in said decrees as "twenty acres of land in fractional section 29, township 3, range 11 west, in Colbert county, Alabama, contiguous to the city of Sheffield, said twenty acres of land lying on one side and partly on the other side of a street two hundred feet wide, to be laid off, * * * and bounded on the northwest by the Tennessee river and the Sheffield Landing, on the northeast by Georgia Ave., on the south by a line running from northeast to southwest, parallel with and nineteen hundred feet from the west boundary line of the block of land on which is erected the Eureka Brick Works and Planing Mill."

And your petitioner avers that it is not the owner of the land so described and has no title thereto or interest therein, either in trust or for its own use, nor is the iron blast furnace, buildings, erections, fixtures, and improvements mentioned in said bill and in and by said decree ordered to be sold, or any of them or any part thereof,

situated on said twenty acres so described in said decree and in said bill; but that said twenty acres so described in said bill and so ordered to be sold in and by said decree is the absolute property of some other person or persons or body corporate, not a party to this cause, than Sheffield Furnace Company, your petitioner, as will more fully and particularly appear, reference being had to the deeds of conveyance to your petitioner for the lands on which its furnace and other improvements are situated, hereto attached and marked Exhibit B, the originals of which will be produced when necessary, and prayed to be made a part of this petition and
49 motion, and in which said deeds said lands so owned by and conveyed to your petitioner and on which his iron blast furnace and other improvements are situated is described as twenty acres of land in fractional section 29, township 3, range (11) eleven west, in Colbert county, Alabama, contiguous to the city of Sheffield, said twenty acres of land lying partly on one side and partly on the other side of a street or avenue two hundred feet wide, laid off by the Sheffield Iron and Coal Co. of Alabama and now known as Railroad avenue, and being bounded on the northwest by the Tennessee river and by said Railroad Ave. (which has been laid off as an avenue, over which tracks may be laid by said railroad companies and furnace companies, and making a route to and from the eastern quarter of a mile of the Sheffield Landing to and from said roads now in or being built into Sheffield or that may be hereafter *be* built into Sheffield), bounded on the southwest by said Railroad avenue and by a line drawn through the centre of a ravine along and across which said Railroad avenue crosses near the river, and also near the southern corner of said twenty acres of land; bounded on the southeast by Twenty-second avenue, and on the northeast by a line that with the other boundary lines and excluding said Railroad avenue and other avenues or streets will embrace twenty acres of land, on which said Sheffield Furnace Company has nearly completed the erection of a large iron blast furnace and appurtenances; and your petitioner avers that said land so described in and conveyed by said deeds to your petitioner is in all respects and in every particular other and different land from that described in the statement filed by said complain-
50 ant, James P. Witherow, in the office of the probate judge for Colbert county, Alabama, for his contractor's and builder's lien thereon, and mentioned and ordered to be sold in said final decree of this court. Your petitioner further alleges and shows unto your honor, as it is advised by counsel and so believes and avers, it has a full, perfect, and meritorious defence to the demand and claim set up in said bill in this cause as the foundation for the contractor's and builder's lien therein claimed and asserted, and to each and every part thereof, and to the lien claimed in said bill and established by said decree, and that it should be allowed to make and sustain its said defence. Your petitioner therefore prays and moves this honorable court to set aside, vacate, and anul said final decree of said circuit court of the United States, in equity, rendered on the 19th day of December, 1888, and said decree *pro confesso*, rendered

on the 5th day of November, 1888, and entered in the order book of said circuit court of the United States, in equity, and that your petitioner may be allowed to put in and enter an appearance to said cause and be permitted to plead or demur to or answer said bill in equity according to the said rules of this court; that your honor will issue an order to the clerk of said circuit court of the United States for the district aforesaid, in equity, appointed special master by said final decree to make sale of the property in said decree mentioned, suspending and staying said sale until the further order and decree of this court, and that notice may be given to the said James P. Witherow or his solicitor or solicitors of record to appear and
51 answer this motion, if he or they should desire so to do, and for such other, further, or different relief as to your honor may seem meet and to justice may pertain; and as in duty bound your petitioner will ever pray, &c.

SHEFFIELD FURNACE COMPANY,
By ALFRED H. MOSES, *Pres't.*

UNITED STATES OF AMERICA, *Middle District of Alabama,* } *ss:*

Alfred H. Moses, being duly sworn, deposes and sayeth—

That he is the president of the petitioner and movant in the foregoing petition and motion named, Sheffield Furnace Company, and has read the same and knows the contents thereof; that the said petition and motion *is* true of his knowledge except as to those matters which are therein stated to be on his information and belief, and as to these he believes *it* to be true.

ALFRED H. MOSES,
Pres't Sheffield Furnace Co.

Sworn to before me this 2nd day of February, 1889.

J. W. DIMMICK,
U. S. Com. and Clerk.

THOMAS R. RAULHAC,
Sol. for Motion.

52 UNITED STATES OF AMERICA, *Northern District of Alabama, Northern Division, at Huntsville,* } *ss:*

To the honorable judges of said circuit court for said district and division, having jurisdiction in equity:

James P. Witherow, who avers himself to be a citizen of and residing in the State of Pennsylvania, in the city of Pittsburgh, brings this his bill against the Sheffield Furnace Company, a corporation duly chartered under the laws and a citizen of the State of Alabama, and residing and having its principal office and place of business at Sheffield, Colbert county, Alabama, in said district and division.

And thereupon your orator complains and says that on the 25th day of June, 1886, said complainant made and entered into a contract and agreement with said defendant, whereby he was to con-

struct for said defendant a certain coke blast iron furnace, at and for the price of one hundred and twenty-four thousand dollars ($124,000.00), upon foundations to be furnished by said defendant, upon its twenty-acre furnace site at Sheffield, Colbert county, Alabama, which said contract and agreement was made and entered into on the 2nd June, 1886, by said defendant, through its duly authorized officers and agents, all reduced to writing, an original of which will be produced at the hearing of this cause, if necessary.

Complainant further sets forth and shows to the court that a further and other written contract and agreement was afterwards entered into, by which he was to construct a stock-house for said furnace at and for the cash —, of $7,600, in addition to the price set forth and named in the first-mentioned contract, and that said contract for the erection of said stock-house was entered into
53 between said parties about the 8th day of November, 1886, an original of which contract will be produced at the hearing, if necessary.

Complainant further avers and shows to the court that, at the special instance and request of the defendant, he also placed in said furnace, about the 1 May, 1886, one extra boiler, at and for the price of $4,000, for which boiler defendants were and are bound to pay said complainant, in addition to the amounts hereinbefore stated.

Complainant avers and shows to the court that, in addition to the furnace, stock-house, and the extra boiler aforesaid, at the special instance and request of the defendant, complainant did other and further extra work about said furnace, and paid out and expended other and further monies in the construction and building of said furnace, as such original contractor and furnace-builder, over and above said three last-mentioned items, amounting in the aggregate to about $16,327.76.

Complainant avers and shows to the court that in the making and performing of his said contract with the said defendant he was the original contractor and builder and entitled under and by virtue of the laws and statutes of the State of Alabama, and upon the completion of the work under his contract, to a lien for all the monies and balances so due him as original contractor and builder; that the amount due to said complainant after all allowances and just credits and payments made by defendant to complainant upon said furnace contract is $63,279.43, besides interest
54 upon same.

That in pursuance of said lien laws of the State of Alabama and within six months after said indebtedness had accrued, to wit, on the 27th of June, 1888, complainant caused to be made out and filed in the office of the judge of probate of Colbert county, Alabama, that being the county in which the property upon which a lien is sought to be enforced is situated, a statement in writing, verified by the oath of complainant and containing a just and true account of the demand secured by the lien after all just credits have been given, and a description of the property upon which said lien is claimed, and the name of the owner or proprietor thereof, all of which facts are fully set forth and shown by Exhibit "A," hereto

annexed and asked to be made a part of this bill, and to which liberty of reference is prayed as often as is necessary.

And complainant sets forth and shows that under and by virtue of the laws and statutes of Alabama the lien proceedings so as above set forth, instituted in Colbert county, Alabama, he is entitled to and has as such original contractor and builder a first lien, not only upon said furnace itself, but, in addition thereto, upon either the whole twenty acres of said furnace site (as set forth and shown in said "Exhibit A") or, in any event, upon the one acre upon which the said furnace itself is located—

Complainant having fully complied with his contract for the building of said furnace and with the provisions of the statute of Alabama in establishing his lien, said lien being given to complainant under and by force of sections 3018 to 3048, inclusive,
55 of the Code of Alabama of 1886, vol. 1. Wherefore complainant, waiving discovery under oath from said defendant, prays this honorable court that an account may be taken by it or under its direction of what is due and owing to complainant by said defendant for his principal and interest under said contract as aforesaid, which said amount, when so ascertained by said court or by a master in chancery under its direction, the court will decree full payment of — the same shall be made to complainant by defendant at a short day therein to be specified, and that upon failure of defendant to pay off and satisfy the amount so to be found due to complainant the aforesaid lien may be foreclosed and all equity of redemption in and to said furnace and such land upon which it is situated as the court shall find subject to the lien of complainant shall be forever barred, and that a sale may be made under the decree and direction of this court of said furnace and premises to satisfy complainant's debt free and disencumbered of any and all other liens or mortgages or equity of redemption. Your orator also prays that a writ of subpœna be issued out of this honorable court directed to said defendant, The Sheffield Furnace Company, commanding it, at a certain time and under a certain penalty therein to be limited, to be and appear before this honorable court, then and there full, true, and perfect answer to make to all and singular the premises herein; and your orator further prays for such general and personal decree against the said defendant, The Sheffield
56 Furnace Company, for such sum as may not be satisfied by the sale of such furnace and the grounds upon which it is situated. Your orator also prays for such other and further general relief, orders, and decrees as shall be meet and equitable.

HENRY B. THOMPKINS,
Solicitor for Complainant.

THOMPKINS AND BRANDON,
Of Counsel.

Endorsed: No. 149. In equity. Circuit court of U. S., northern district of Alabama, at Huntsville. James P. Witherow, complainant, and Sheffield Furnace Company, defendant. Foreclosure of

contractor's lien. Original bill. Filed in clerk's office this 5th day of September, A. D. 1888. A. W. McCullough, clerk.

EXHIBIT "A."

THE STATE OF ALABAMA, *Colbert County:*

To the honorable probate court of said county:

James P. Witherow, original contractor and blast iron furnace-builder, residing at Pittsburgh, in the State of Pennsylvania, claims a lien, under sect. 3018 *et sequitur* of the Code of Alabama of 1886, as such original contractor and furnace-builder upon the iron blast furnace of the Sheffield Furnace Company, a corporation
57 chartered by the laws of Alabama, and which furnace was completed and ready to go into blast on the — day of ——, 1888, and is situated at Sheffield, Colbert county, Alabama, on the south bank of the Tennessee river, on a site containing about twenty acres, described as follows: "Twenty acres of land in fractional section 29, township, 3, range 11 west, in Colbert county, Ala., contiguous to the city of Sheffield, said twenty acres of land lying partly on one side and partly on the other side of a street two hundred feet wide, to be laid off, * * * and bounded on the northwest by the Tennessee river and the Sheffield Landing, on the northeast by Georgia avenue, on the south by a line running from northeast to southwest parallel with and nineteen hundred feet from the west boundary line of the block of land on which is erected the Eureka Brick Works & Planing Mill." And the said James P. Witherow, original contractor and furnace-builder, also claims a lien not only upon said iron blast furnace and its appurtenances so by him erected upon said furnace site under and by virtue of a contract to construct the same made with said Sheffield Furnace Company, who is the owner and proprietor of said furnace and grounds or site upon which it is built, but said Witherow also claims a lien upon the said grounds and site upon which said furnace and appurtenances is so erected and built. Said lien is so claimed by reason of an unpaid balance now due to said Witherow, as such original contractor and builder, by said Sheffield Furnace Company on account of the building and construction of said furnace and the work, labor, fixtures, material, machinery, engines, boilers, and other necessary appliances furnished for and put into said furnace by said Witherow,
58 the amount still due and unpaid to said Witherow by said Sheffield Furnace Company being the sum of sixty-three thousand two hundred and seventy-nine $\frac{43}{100}$ ($63,279.43), besides interest, which amount is fully set forth and shown is detail by the statement hereto annexed and marked Exhibit "A," containing one page, and made a part of this claim of lien as fully as if the same were embodied in this paper.

THOMPKINS AND BRANDON,
Att'ys for Plaintiff, James P. Witherow.

STATE OF ALABAMA, *Jefferson County:*

Sworn to and subscribed before me this 22nd day of May, 1888.
[SEAL.] W. F. POE,
Notary Public.

STATE OF ALABAMA, *Jefferson County:*

Personally appeared before the undersigned, a notary public in and for said State and county, James P. Witherow, who on oath says that the statements in the foregoing paper claiming a lien on the furnace and ground and site on which it is situated, and belonging to the Sheffield Furnace Company, of Sheffield, Alabama, are true, and that the account herein set forth against the Sheffield Furnace Company in the exhibit marked "A" is just and true after all just credits have been given, and that the same is due and unpaid.
JAMES P. WITHEROW.

Sworn to and subscribed before me this 22nd day of May, 1888.
[SEAL.] W. F. POE,
Notary Public.

59 EXHIBIT "A."

PITTSBURGH, PA., *May* —, 1888.

Sheffield Furnace Company in Account with James P. Witherow, Engineer and Contractor.

1888.				
July	22nd.	To bill rendered, labor on foundations		42 68
Oct.	26.	" " " castings		459 36
	26.	" " " cash, Minor Scovel		1 65
Dec.	4.	" " " freight car clay, C. & O., #774, and unloading 3 cars clay		114 00
1887.				
Jan.	14.	" " " freight on two cars clay, #262 & 1014, & exchange		148 75
		These cars belong to the Sheffield Furnace Company and freight and expenses paid for by us.		
Dec.	17.	To protested note		12,111 57
		Protest fees		2 50
		Costs on note		50 00
	22.	Bill rendered, coke and ore buggies		1,360 00
		To bill rendered, cars for pig metal		130 00
		Execution of contract dated 2nd June, 1886, furnace		124,000 00
		Execution of contract dated 8 Nov., 1886, stock-house		7,600 00
		To cash, J. R. Baldwin, draft for lumber		400 00

1888.			
Ap'l	26. Bill rendered for articles furnished Nov. & Dec., 1887, & March, 1888	132	75
May	1. Extra boiler	4,000	00
"	11. Bill rendered for articles furnished May 5 & 8, 1888	375	00
		$151,927	76
	Credit by sundries	87,648	33
	Balance due	$63,279	43

Endorsed on back: Filed in office the 27 day of June, 1888, and duly recorded in Book Y of M. & L., pages 197, 198, 199, on the 27th day of June, 1888. John A. Steel, judge of probate. Filed in clerk's office this 5th day of Sept., A. D. 1888. A. W. McCullough, clerk.

60 The President of the United States of America to the marshal for the northern district of Alabama, Greeting:

You are hereby commanded to summon Sheffield Furnace Company, if to be found in your district, that it, laying aside all excuse, appear personally at the office of the clerk of the circuit court of the northern district of the State of Alabama, northern division, in the city of Huntsville, in said district, on the rule day, to be held on the first Monday in October next, to answer, plead, or demur to the bill of complaint exhibited in said circuit court by James P. Witherow, complainant, against Sheffield Furnace Company, defendant, a copy of which bill will be furnished on application to the clerk. Herein fail not, and have you then and there this precept with your return thereon endorsed.

Witness the Honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States, having precedence, the Chief Justiceship being vacated, this first Monday of April, in the year of our Lord one thousand eight hundred and eighty-eight, and of American Independence 112th year.

Attest: A. W. McCULLOUGH,
Clerk of United States Circuit Court.

Issued 5th day of September, A. D. 1888.

61 *Mem.*

The defendant is to enter its appearance and to file its answer or demurrer to said bill in the clerk's office on or before the day on which this writ is returnable; otherwise a decree *pro confesso* may be entered.

The marshal is required to execute this writ twenty days before the return day thereof.

The marshal, by directions of complainant's solicitor, will make service upon Alfred H. Moses, Esq., president of Sheffield Furnace Company, at Sheffield, Alabama.

I hereby deputize and appoint J. D. Chadwick specially to execute the within process.

Huntsville, Alabama, Sept. 5th, 1888.

A. H. KELLER, *U. S. M.*

Further endorsed: Rec'd at marshal's office this 5th day of Sept., 1888. A. H. Keller, U. S. M.

Further endorsed: Executed the 6th day of Sept., 1888, by serving a copy of the within writ on defendant by delivering to Alfred H. Moses, president of said company, at his residence, in Sheffield, Alabama. A. H. Keller, U. S. M., by J. D. Chadwick, special deputy.

Returned and filed Sept. 7th, 1888.

A. W. McCULLOUGH, *Clerk.*

62 In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama. In Equity.

JAMES P. WITHEROW, Complainant,
vs.
THE SHEFFIELD FURNACE CO., Defendant.

Comes the defendant in the above-entitled cause, by its solicitors, and demurs to the bill of complaint filed therein, and for causes of demurrer assigns the following grounds, viz:

I. That said bill is wanting in equity, in this, that said bill alleges that the furnace mentioned therein as constructed by the complainant for the defendant was constructed under a certain contract in writing dated June 2nd, 1886, but said bill fails to aver or show what the terms of said contract were, so that it may be ascertained from said bill whether the work and construction for which complainant claims a lien upon the property of the defendant was done in accordance with the terms, stipulations, and provisions of said contract, or whether any of the terms of said contract were complied with by said complainant.

II. That said bill is wanting in equity, in this, that said bill alleges that the stock-house for said furnace mentioned therein as constructed by the complainant for the defendant was constructed under a certain contract in writing dated about November the 8, 1886, but said bill fails to show or allege what the terms of said contract were, so that it may be ascertained from the said bill whether the work and construction for which complainant claims a lien upon the property of the defendant was done in accordance with the terms, stipulations, and provisions of said contract, or whether any of the terms of said contract were complied with by said complainant.

63 III. That said bill of complaint fails to allege any certain or sufficient description of the lands mentioned as the site of said furnace, whether the said site consists of twenty acres or one acre, as is required by law for the enforcement of a builder's or a contractor's lien.

IV. That said bill is wanting in equity, in this, that it shows on its face that said furnace and stock-house were built and constructed in a town or city, to wit, at Sheffield, county of Colbert, and State of Alabama, but said bill fails to show that said complainant filed the verified statement necessary by the statutes of the State of Alabama to obtain a contractor's lien, in this, that said bill nowhere alleges that said complainant made any selection of any lot in said town or city on which said furnace and stock-house or either of them was built at or before the filing of the statement in the office of the probate judge of said Colbert county, Alabama, required by law, or that in such statement alleged by complainant to have been so filed he described any lot in said city or town of Sheffield which should be subject to a contractor's lien.

V. That said bill is wanting in equity, in this, that it shows on its face that said furnace and stock-house were built and constructed either in a town, city, or village, or not in a city, town, or village, but said bill fails to show that said complainant at any time prior to filing his statement in the office of the judge of probate required by law to select the one acre not in a city, town, or village which shall be subject to the lien claimed by him, or that in the verified statement required by law to be filed in the office of the judge of probate of the county in which said property was situated he gave any description of the lot in a city, town, or village on which the lien was claimed.

64 VI. That said bill is indefinite and uncertain, in this, that it fails to show whether the site on which said furnace and stock-house were built was a lot in a city, town, or village or was not in a city, town, or village, and fails to show that the statement required by law to be filed in the office of the judge of probate contains any description of the lot in the city, town, or village or of any one acre not in a city, town, or village on which said property was situated which shall be subject to the lien claimed by complainant.

RAULHAC & NATHAN,
Solicitors for Defendant.

Endorsed: 149. In the circuit court of the United States for the northern division of the northern district of Alabama. James P. Witherow *vs.* The Sheffield Furnace Company. Demurrers of defendant. Filed in the clerk's office this 3rd day of October, A. D. 1888. A. W. McCullough, clerk.

65 In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

JAMES P. WITHEROW, Complainant,
vs.
SHEFFIELD FURNACE COMPANY, Defendant. } 149. In Equity.

At rules, first Monday in November, being the fifth day thereof, A. D. 1888.

The subpœna issued in the above cause on the 5th day of Sep-

tember, A. D. 1888, which was duly served on the 6th day of September, 1888, having been returned, which return has been filed, and it appearing therefrom that the said subpœna was so served duly on the defendant herein, Sheffield Furnace Company, by the delivery of a copy thereof to Alfred H. Moses, who is shown to the clerk to be the president at the time of said service, and no appearance having been entered on the part of the said defendant or plea, answer, or demurrer filed, as by law and the rules of this court provided, therefore, on motion of Lawrence Cooper and of complainant's solicitors, it is ordered and decreed that the bill herein be taken *pro confesso* as to said defendant, Sheffield Furnace Company.

A. W. McCULLOUGH, *Clerk.*

66 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Northern District and Division of Alabama, at Huntsville. In Equity.

JAMES P. WITHEROW
vs.
SHEFFIELD FURNACE COMPANY.

And now comes the complainant in the above-stated cause and amends his original bill therein as follows:

Complainant avers and shows to the court that the city of Sheffield, in Colbert county, was duly incorporated by an act of the General Assembly of the State of Alabama entitled An act to incorporate the city of Sheffield, in the county of Colbert, which said act was approved February 17th, 1885, and is to be found in the Acts of the General Assembly of the State of Alabama for the years 1884 and 1885, on pages 781 to 810, inclusive, and which act is hereby specially pleaded and shown to the court.

Complainant further avers and shows to the court that under the provisions of the said act and by reference to a map of the city of Sheffield made by Chas. Boeckh, C. E., on file in the office of the judge of probate of Colbert county, and which map is specially referred to in said act of the Legislature, that the twenty acres of land set forth and referred to in complainant's original bill of complaint as being the site upon which the furnace of said Sheffield Furnace Company is situated form a part of said grounds referred to and set forth on said map as constituting the city of Sheffield, and
67 that said twenty acres, so being the furnace site aforesaid, was and is subject to the jurisdiction and control of the authorities of the city of Sheffield.

And complainant further avers and shows to the court that said furnace, stock-house, and other buildings and appurtenances connected with said furnace and forming a part of the same are situated about the middle of said twenty acres, as set forth and described in said bill of complaint, and that said furnace and appurtenances extend over and occupy more than one acre of land, and that said twenty acres of land so forming site for said furnace is necessary for the convenient and profitable operation of said furnace, and

without the whole of said twenty acres the said furnace could not be operated in such a manner as to make the property remunerative.

Wherefore complainant prays as set forth in the original bill of complaint.

HENRY B. TOMPKINS,
Of Tompkins and Brandon, Solicitors for Complainant.

Endorsed: No. 149. The United States circuit court, northern district and northern division of Alabama. James P. Witherow *vs.* Sheffield Furnace Co. Amended bill in equity. Filed in clerk's office this the 14th day of Nov., A. D. 1888. A. W. McCullough, clerk.

68 In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama, at Huntsville. In Equity. October Term, 1888.

JAMES P. WITHEROW, Complainant,
vs.
THE SHEFFIELD FURNACE COMPANY, Defendant. } No. 149.

Bill for foreclosure of contractor's lien on realty and buildings erected thereon.

Final Decree.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

Upon appearance and motion of complainant's solicitor, upon the whole record being exhibited and shown that service had been duly made on the defendant and a decree *pro confesso* had been regularly taken, and that no appearance had been made or defense offered by defendant, and upon proofs submitted, it is ordered, adjudged, and decreed that the allegations in the pleadings of complainant are found to be true, and that complainant, James P. Witherow, as the original contractor and furnace-builder, has a valid lien upon the furnace site of twenty acres and the iron blast furnace, stock-house, and all other buildings, erections, houses, improvements, fixtures, and property thereon situated, lying, and belonging, said twenty acres being described as follows: Twenty acres of land in fractional section 29, township 3, range 11 west, in Colbert county, Alabama, contiguous to the city of Sheffield, said twenty acres of land lying on one side and partly on the other side of a street two hundred feet wide, to be laid off, * * * and bounded on the northwest by
69 the Tennessee river and the Sheffield Landing, on the northeast by Georgia avenue, on the south by a line running from northeast to southwest, parallel with and nineteen hundred feet from the west boundary line of the block of land on which is erected the Eureka Brick Works and Planing Mill.

The court further finds upon the record and proofs submitted that

the amount due to the said James P. Witherow by the Sheffield Furnace Company aforesaid is the sum of sixty-three thousand two hundred and seventy-nine & $\frac{43}{100}$ dollars ($63,279.43), with interest, at the rate of eight per cent. per annum, on that sum from the 11th day of May, 1888, which amounts on this date to the aggregate sum of sixty-six thousand three hundred and forty-four & $\frac{31}{100}$ dollars.

It is therefore ordered, adjudged, and decreed by the court that the defendant, The Sheffield Furnace Company, do pay to said James P. Witherow or his solicitors of record herein said sum of sixty-six thousand three hundred & forty-four $\frac{31}{100}$ dollars (which said sum shall bear interest from the date thereof until paid) on or before the twentieth day of January, 1889, in which event and upon such payments being made the lien of said Witherow shall be discharged from the aforesaid property of defendant; but in default of such payments by said defendant on or before the aforesaid date last above written, that then and in that event the said lien of said complainant shall be and become absolutely foreclosed and established against the aforesaid twenty acres of land and the buildings and appurtenances thereon erected, and against all equity of redemption and other right of the defendant of, in, or to the said twenty acres and the buildings and appurtenances thereon erected or in anywise appertaining.

70 And that upon such foreclosure so becoming absolute the clerk of this court is hereby appointed special master and is directed to take possession of all of said property and shall, upon the request of complainant's solicitor, proceed and advertise and sell said twenty acres and appurtenances in conformity with the rules and regulations governing the sale of premises upon which a mortgage deed has been duly foreclosed by process and decree of this court, such sale to be made in front of the court-house door, in the city of Huntsville, State of Alabama, after having given thirty days' notice, once a week for four weeks, in a newspaper published in the city of Huntsville aforesaid, such sale to be to the highest bidder for cash, and upon payment of purchase-money bid at such sale the clerk and master will execute a deed to the purchaser, conveying all right, title, and interest that defendant, The Sheffield Furnace Company, has in and to said property, and shall place such purchaser in possession of said property sold, and shall report his action in the premises to the next term of this court.

It is further ordered, adjudged, and decreed that the defendant do pay all costs of this case, to be taxed by said clerk and master, for which let execution issue.

Dec. 19th, 1888.

JOHN BRUCE, *Judge.*

71 Endorsed: I, A. W. McCullough, — of said circuit court, do hereby certify that the above and foregoing are true and correct copies of the originals on file in my office. Witness my hand and the seal of said court this 28th day of January, A. D. 1889. A. W. McCullough, clerk of the U. S. circuit court, northern district of Ala.

Further endorsed: No. 149. United States circuit court, northern division, northern district Ala. James P. Witherow *vs.* Sheffield Furnace Company. Motion and petition.

Further endorsed: Filed in clerk's office this 4th day of Feb., 1889. A. W. McCullough, clerk.

72 EXHIBIT "B."

STATE OF ALABAMA, }
Colbert County. }

Whereas, on the 20th day of September, 1886, the Sheffield Land, Iron, and Coal Company, of Alabama, executed a deed of trust selling and conveying to William L. Chambers, James R. Adams, and Henry C. Moses, as trustees, twenty (20) acres of land in fractional section 29, township 3, range 11 west, in Colbert county, Alabama, contiguous to the city of Sheffield; also the right to use a strip of a portion of the Sheffield Landing forty (40) feet wide; also certain rights of way; all of which are more fully and particularly described in said deed of trust and hereinafter; and whereas, on the 1st day of October, 1887, said company executed a deed of trust selling and conveying to said trustees certain blocks of land in and adjoining or adjacent to said city of Sheffield, amounting in the aggregate (inclusive of one-half of streets or avenues, lanes and alleys, through or bounding said blocks) to three hundred and twenty (320) acres; also all the right, title, and interest of said company in and to mineral rights in five hundred (500) acres of land in Franklin county, Alabama, all of which are more fully and particularly described in said deed of trust and hereinafter, which said deeds of trust were executed pursuant to certain resolutions of said company recited therein; and whereas the Sheffield Furnace Company was organized by said William L. Chambers, James R. Adams, and Henry C. Moses, and their associates, before the first day of April, 1886, for the erection on said twenty
73 (20) acres of land of an iron blast furnace of estimated daily capacity of not less than one hundred tons, with a *bona fide* subscribed capital stock of more than seventy-five thousand dollars, and commenced the erection of said furnace before the first day of July, 1886, and expended more than thirty-seven thousand five hundred dollars in cash of the capital stock in or towards the construction of said furnace and appurtenances before the first day of April, 1887, and more than thirty-seven thousand five hundred dollars additional, in cash, of said capital stock in or towards the construction of said furnace and appurtenances before this date; and whereas said Sheffield Furnace Company has expended in cash, out of its capital stock, one hundred and fifty thousand dollars in and towards the construction of said furnace and appurtenances, and has issued its first-mortgage bonds, bearing interest at six per cent. per annum, the entire issue of which is one hundred and fifty thousand dollars, or not exceeding the amount actually expended, out of cash paid in or realized on subscriptions to its capital

stock, or the amount necessary to complete said furnace and appurtenances, and to furnish a working capital not exceeding fifty thousand dollars for said furnace company, and has secured said bonds by first mortgage or deed of trust upon all of the property and containing all of the stipulations required by said two deeds of trust hereinbefore described: Now, therefore, know all men by these presents that we, the said William L. Chambers, James R. Adams, and Henry C. Moses, as trustees as aforesaid, in consideration of the premises, and of five dollars to us in hand paid by said Sheffield Furnace Company, a corporation organized under the general incorporation laws of Alabama, the receipt whereof is hereby acknowledged, have this day bargained and sold, and by
74 these presents do alien, sell, and convey, unto said Sheffield Furnace Company, its successors and assigns, twenty (20) acres of land in fractional section 29, township 3, range 11 west, in Colbert county, Alabama, contiguous to the city of Sheffield; said twenty acres of land lying partly on one side and partly on the other side of a street or avenue two hundred feet wide, laid off by the Sheriff Land, Iron and Coal Company of Alabama, and now known as Railroad avenue, and being bounded on the northwest by the Tennessee river and by said Railroad avenue (which has been laid off as an avenue over which tracks may be laid by railroad companies and furnace companies, and making a route to and from the eastern quarter of a mile of the Sheffield Landing to and from railroads now in or being built into Sheffield or that may hereafter be built into Sheffield); bounded on the southwest by said Railroad avenue and by a line drawn through the centre of a ravine, along and across which said Railroad avenue crosses, near the river and also near the southern corner of said twenty acres of land; bounded on the northeast by Twenty-second avenue and on the northeast by a line that, with the other boundary lines and excluding said Railroad avenue and other avenues or streets, will embrace twenty acres of land on which said Sheffield Furnace Company has nearly completed the erection of a large iron blast furnace and appurtenances; also said furnaces and appurtenances; also the right to use a strip of the Sheffield Landing forty (40) feet wide and extending along such part of said twenty acres of land as is bounded by said landing
75 or as much of said strip as may be necessary for quarrying purposes; also all necessary rights of way through said Railroad avenue and over the Sheffield Landing for tracks, side tracks, and switches to connect the Sheffield Furnace Company's furnaces, quarries, and other works with the river as far up as one quarter of a mile from the eastern end of said landing, which eastern quarter of a mile is reserved by the Sheffield Land, Iron and Coal Company of Alabama as a steamboat landing, and through said Railroad avenue and other streets or avenues with such railroads as are or may be built into Sheffield, provided that not more than two tracks shall be laid by said Furnace Company through any streets or avenues or on said landing without the written consent of said Sheffield Land, Iron and Coal Company of Alabama; also the following blocks of land in and adjoining or adjacent to said city of

Sheffield, amounting in the aggregate (inclusive of one-half of streets or avenues, lanes or alleys, through or bounding said blocks) to three hundred and twenty acres, to wit:

Block # 474 (formerly # 267). Block # 441 (formerly # 224).
Block # 442 (formerly # 225). Block # 444 (formerly # 226).
Block # 411 (formerly # 234). Block # 413 (formerly # 236).
Block # 415 (formerly # 238). Block # 377 (formerly # 246).
Block # 379 (formerly # 248). Block # 380 (formerly # 249).
Block # 381 (formerly # 250). Block # 382 (formerly # 251).
Block # 383 (formerly # 252). Block # 384 (formerly # 253).
Block # 385 (formerly # 254). Block # 347 (formerly # 262).
Block # 348 (formerly # 263). Block # 350 (formerly # 265).
76 Block # 352 (formerly # 267). Block # 353 (formerly # 268).
Block # 354 (formerly # 269). Block # 355 (formerly # 270).
Block # 356 (formerly # 271). Block # 344 (formerly # 259).
Block 317 (formerly 276). Block 319 (formerly 278).
Block 321 (formerly 280). Block 323 (formerly 282).
Block 324 (formerly 283). Block 325 (formerly 284).
Block 326 (formerly 285). Block 327 (formerly 286).
Block 288 (formerly 304). Block 290 (formerly 306).
Block 296 (formerly 312). Block 300 (formerly 316).
Block 263 (formerly 333). Block 265 (formerly 335).
Block 267 (formerly 337). Block 269 (formerly 339).
Block 294 (formerly 310). Block 292 (formerly 308).
Block 240 (formerly 358). Block 242 (formerly 360).
Block 244 (formerly 362). Block 246 (formerly 364).
Block 250 (formerly 368). Block 219 (formerly 381).
Block 221 (formerly 383). Block 223 (formerly 385).
Block 225 (formerly 387). Block 227 (formerly 389).
Block 229 (formerly 391). Block 200 (formerly 402).
Block 202 (formerly 404). Block 206 (formerly 408).
Block 204 (formerly 406). Block 208 (formerly 410).
Block 183 (formerly 421). Block 185 (formerly 423).
Block 187 (formerly 425). Block 189 (formerly 427).
Block # 168 (formerly # 438). Block # 170 (formerly # 440).
77 Block 172 (formerly 442). Block 155 (formerly 453).
Block 157 (formerly 455). Block 144 (formerly 466).

And lots number eleven (11) to twenty (20), inclusive, in block number 248 (formerly # 366); also all the right, title, and interest of said William L. Chambers, James R. Adams, and Henry C. Moses, as trustees, in and to mineral rights in five hundred (500) acres of land, to wit, the W. ½ of S. W. ¼ of section ten (10), the N. E. ¼ of N. E. ¼ of section sixteen, (16) the N. E. ¼ of N. W. ¼ and W. ½ of N. E. ¼ of N. E. ¼ of section twenty-one (21), the S. W. ¼ of section two (2), the E. ½ of S. E. ¼ of section three (3), the E. ½ of S. W. quarter of section eight (8), all in township seven (7), range twelve (12) west, and thirty acres of the S. E. ¼ of S. E. ¼ of section thirty-six (36), township six (6), range thirteen (13) west, and thirty acres of the N. E. ¼ of N. E. ¼ of section one (1), township seven (7), range thirteen (13) west, all in the county of Franklin and State of Ala-

bama, being the same and all of the property, rights, and franchises conveyed to us as trustees by the Sheffield Land, Iron and Coal Company of Alabama by said two deeds of trust hereinbefore first described; to have and to hold unto said Sheffield Furnace Company, its successors and assigns, in fee simple forever. This conveyance as to said blocks of land and adjacent to the city of Sheffield and hereinbefore described by their respective numbers is made
78 upon and subject to the following conditions, to wit:

I. That neither said premises nor any part thereof shall be used as a cemetery or public or private burying ground.

II. That no store-house or building or structure for business or commercial purposes shall be erected upon the premises hereby conveyed or upon any part thereof, and that no building or structure erected for other purposes upon said premises or upon any part thereof shall be used for business or commercial purposes before the tenth day of May, in the year eighteen hundred and eighty-nine (1889), except by consent in writing first obtained from the board of directors of the Sheffield Land, Iron and Coal Company of Alabama, or unless said board of directors remove said restriction at their own pleasure.

In testimony whereof we have hereunto signed our names and affixed our seals this first day of October, 1887.

(Signed) WILLIAM L. CHAMBERS, [SEAL.]
JAMES R. ADAMS, [SEAL.]
HENRY C. MOSES, *Trustees.* [SEAL.]

79 THE STATE OF ALABAMA, *Montgomery County:*

I, N. B. Holt, a notary public in and for the said county, in said State, hereby certify that William L. Chambers, James R. Adams, and Henry C. Moses, whose names are signed to the foregoing conveyance and who are known to me, acknowledged before me on this day that, being informed of the contents of this conveyance, they executed the same voluntarily on the day the same bears date.

Given under my hand and seal this the 11th day of November, A. D. 1887.

(Signed) N. B. HOLT,
Notary Public.

THE STATE OF ALABAMA, *Colbert County:*

I hereby certify that the within conveyance was filed in my office for record on the 14th day of November, 1887, at three o'clock p. m., and duly recorded in vol. J of Deeds, page 533 *et sequitur*, on the 14th day of Nov., 1887.

(Signed) JOHN A. STEEL,
Judge of Probate.

STATE OF ALABAMA, *Colbert County:*

I, John Steel, judge of probate in and for said county and State, hereby certify that the foregoing is a true and correct copy of the deed recorded in Deed Book J, pages 533 *et sequitur*, in this office.

Given under my hand and seal this 5th day of Nov., 1888.

JOHN A. STEEL,
Judge of Probate,
By H. B. THOMPSON, *Clerk.*

80 THE STATE OF ALABAMA, *Franklin County:*

I hereby certify that the within conveyance was filed in my office for record on the 16th day of Nov., 1887, at 9 o'clock a. m., and duly recorded in volume B 2 of Deeds, page 365 *et sequitur*, on the 16th day of Nov., 1887.

(Signed) JAMES M. JORDAN,
Judge of Probate.

Endorsed: Deed. William L. Chambers, James R. Adams, Henry C. Moses, trustees, to Sheffield Furnace Company.

81 Circuit Court of the United States for the Northern Division of the Northern District of Alabama. In Equity.

JAMES P. WITHEROW, Complainant,
vs.
SHEFFIELD FURNACE COMPANY, Defendant.

Henry B. Tompkins, Tompkins & Brandon, and Lawrence Cooper, solicitors for complainant in the cause of James P. Witherow *vs.* Sheffield Furnace Company:

You are hereby notified that a petition and motion to set aside the final decree and decree *pro confesso* in said cause have been filed in the clerk's office, and the following order made by Judge Bruce in said cause has been filed, to wit:

UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of the Northern District of the Northern Division of Alabama. at Huntsville, Alabama. In Equity.

JAMES P. WITHEROW, Complainant,
vs.
SHEFFIELD FURNACE COMPANY, Defendant.

In this cause, upon petition and motion of the defendant in the above-stated cause to set aside the final decree rendered in said cause on the 19th day of December, 1888, and the same coming on now to be heard before the Honorable John Bruce, judge of said cir-
82 cuit court for the district and division aforesaid, in equity, at chambers, on this the second day of February, 1889, and the same being duly considered by the court, it is ordered, adjudged, and decreed that the said defendant, Sheffield Furnace Company, have, and is hereby granted, leave to file the said motion and petition in the said circuit court for the district and division aforesaid, in equity, and that the said motion and petition be heard and consid-

ered before the Honorable John Bruce, judge of said court in the said district and division aforesaid, at chambers, in the city of Montgomery, Alabama, on Thursday, the 14th day of February, 1889, at 11 o'clock a. m. of said day, when and where the said complainant may appear and contest the same; and it appearing to the court that it is proper that notice of said petition and motion should be given to the solicitors or solicitor of record of the said complainant, it is therefore ordered that the clerk of said circuit court of the United States for the district and division aforesaid, in equity, forthwith, upon the filing of said petition and motion of said defendant and of this order, issue notice to the solicitor or solicitors of record of said complainant of the hearing of said petition and motion at the time and place hereinabove mentioned.

83 Given under my hand and dated at chambers on this the 2nd day of February, 1889.

JOHN BRUCE, *Judge.*

Endorsed: James P. Witherow *vs.* Sheffield Furnace Co. Filed in clerk's office Feb'y 4, 1889. A. W. McCullough, clerk.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this second Monday of October, [SEAL.] in the year of our Lord one thousand eight hundred and eighty-eight.

Issued the 4th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

Attest: A. W. McCULLOUGH,
Clerk U. S. Circuit Court, Northern District of Ala.

Endorsed: Personally served a copy of the within writ on Henry B. Tompkins & also Tompkins & Brandon by serving a copy on Morris Brandon, both at Atlanta, Fulton county, Georgia, on February 5th, 1889. J. W. Nebus, U. S. M., E C. Murphy, deputy. No. 149. James P. Witherow *vs.* Sheffield Furnace Co. Original branch notice. Returned and filed Feb'y 12, 1889. A. W. McCullough, clerk.

84 Circuit Court of the United States for the Northern Division of the Northern District of Alabama. In Equity.

JAMES P. WITHEROW, Complainant,
vs.
SHEFFIELD FURNACE COMPANY, Defendant.

Henry B. Tompkins, Tompkins & Brandon, and Lawrence Cooper, solicitors for complainant in the cause of James P. Witherow *vs.* Sheffield Furnace Company:

You are hereby notified that a petition and motion to set aside the final decree and decree *pro confesso* in said cause have been filed in the clerk's office, and the following order made by Judge Bruce in said cause has been filed, to wit:

UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of the Northern District of the Northern Division of Alabama, at Huntsville, Alabama. In Equity.

JAMES P. WITHEROW, Complainant,
vs.
SHEFFIELD FURNACE COMPANY, Defendant.

In this cause, upon petition and motion of the defendant in the above-stated cause to set aside the final decree rendered in said cause on the 19th day of December, 1888, and the same coming on now to be heard before the Honorable John Bruce, judge of
85 the said circuit court for the district and division aforesaid, in equity, at chambers, on this the second day of February, 1889, and the same being duly considered by the court, it is ordered, adjudged, and decreed that the said defendant, Sheffield Furnace Company, have, and is hereby granted, leave to file the said motion and petition in the said circuit court for the district and division aforesaid, in equity, and that the said motion and petition be heard and considered before the Honorable John Bruce, judge of said court in the said district and division aforesaid, at chambers, in the city of Montgomery, Alabama, on Thursday, the 14th day of February, 1889, at 11 o'clock a. m. of said day, when and where the said complainant may appear and contest the same; and it appearing to the court that it is proper that notice of said petition and motion should be given to the solicitors or solicitor of record of the said complainant, is is therefore ordered that the clerk of said circuit court of the United States for the district and division aforesaid, in equity, forthwith, upon the filing of said petition and motion if said de-
86 fendant and of this order, issue notice to the solicitor or solicitors of record of said complainant of the hearing of said petition and motion at the time and place hereinabove mentioned.

Given under my hand and dated at chambers on this the 2nd day of February, 1889.

JOHN BRUCE, *Judge.*

Endorsed: James P. Witherow *vs.* Sheffield Furnace Co. Filed in clerk's office Feb'y 4, 1889. A. W. McCullough, clerk. A. W. McCullough, clerk U. S. cir. court.

Endorsed: Received copy of within and service thereof acknowledged as if served on me by the marshal for the northern district of Alabama. Feb'y 4, '89. Lawrence Cooper. James P. Witherow *vs.* Sheffield Furnace Company. Original. Issued Feb'y 4, 1889. A. W. McCullough, clerk U. S. cir. c't.

87 In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama. In Equity.

JAMES P. WITHEROW, Complainant,
vs.
SHEFFIELD FURNACE COMPANY, Defendant.

This cause coming on to be heard on the motion made by the defendant therein to set aside the final decree heretofore rendered in said cause on, to wit, the 19th day of December, 1888, said motion having been made and filed on February 4th, 1889, now, upon due consideration of the said motion, it is ordered, adjudged, and decreed that the said motion be, and the same is hereby, overruled and refused upon the ground that the same was not made until after the final adjournment of the term of the court at which said final decree was rendered.

Dated this 15th day of February, 1889.

JOHN BRUCE, *Judge.*

(Endorsed:) Filed in clerk's office this 16th day of Feb., A. D. 1889. A. W. McCullough, clerk.

88 In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama. In Equity.

JAMES P. WITHEROW, Complainant,
vs.
SHEFFIELD FURNACE COMPANY, Defendant.

To the honorable judges of said court:

Your petitioner, Sheffield Furnace Company, the defendant in the above-entitled cause, respectfully represents that the matter in dispute in the above-entitled cause exceeds the sum or value of five thousand dollars, exclusive of costs, and that in the final decree there is manifest error committed to the injury of this petitioner. Wherefore it prays an order granting an appeal from said decree to the Supreme Court of the United States; and petitioner files herewith its bond, with security, in the penalty of twenty-five thousand dollars, the amount fixed by the Honorable John Bruce, judge of this court, which bond is approved by said judge. Wherefore petitioner prays that supersedeas be granted by the order of this court until the final determination of said appeal by said Supreme Court.

Dated this 15th day of Feb., 1889.

SHEFFIELD FURNACE COMPANY,
By MILTON HUMES & ROULBAC & NATHAN.

(Endorsed:) Filed in clerk's office this 16th day of Feb., A. D. 1889. A. W. McCullough, clerk.

89 Know all men by these presents that we, Sheffield Furnace Company, as principal, and Alfred H. Moses, William B.

Davidson, and Owen O. Nelson, as sureties, are held and firmly bound unto James P. Witherow in the full and just sum of twenty-five thousand —, to be paid to the said James P. Witherow, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifteenth day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a term of the circuit court of the United States for the northern division of the northern district of Alabama, in equity, in a suit pending in said court between James P. Witherow and Sheffield Furnace Company, by said court a decree was rendered against the said Sheffield Furnace Company, and the said Sheffield Furnace Company having taken an appeal to the Supreme Court of the United States to reverse the said decree rendered in the above-entitled action, *from* and having obtained an order granting an appeal and supersedeas of said decree and filed the same in the clerk's office of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said James P. Witherow, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

90 Now, the condition of the above obligation is such that if the said Sheffield Furnace Company shall prosecute its said appeal to effect and answer all damages and costs if it fail to make its said appeal and plea good, then the above obligation to be void; else to remain in full force and virtue.

SHEFFIELD FURNACE COMPANY,
By ALF'D H. MOSES, *Pr's't.* [SEAL.]
ALF'D H. MOSES. [SEAL.]
W. B. DAVIDSON. [SEAL.]
O. O. NELSON. [SEAL.]

Sealed and delivered in presence of—
TH'S R. RAULHAC.
H. C. MOSES.

Approved by—
JOHN BRUCE, *Judge.*

Endorsed: Appeal bond. Filed in clerk's office this 16th day of February, A. D. 1869. A. W. McCullough, clerk.

91 In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama. In Equity.

JAMES P. WITHEROW, Complainant,
vs.
SHEFFIELD FURNACE COMPANY, Defendant.

In this cause, the defendant having made its application in writing for an appeal from the final decree therein to the Supreme Court of

the United States, accompanying said application with bond in the penalty in the sum of twenty-five thousand dollars, which said sum is hereby fixed as the amount of the penalty of the bond for the supersedeas of said decree, and it appearing to my satisfaction that the matter in dispute in said cause exceeds the sum or value of five thousand dollars, exclusive of costs, and said bond and security therefor is good and sufficient and this day approved by me; it is therefore ordered, adjudged, and decreed that said application for said appeal be, and the same is hereby, granted, and that the same, together with said bond, be filed in said circuit court, and the clerk of said court is hereby ordered to stay all proceedings in execution of said final decree until the final determination of said appeal.

Dated this February 15th, 1889.

JOHN BRUCE, *Judge.*

(Endorsed:) Filed in clerk's office this 16th day of Feb., A. D. 1889. A. W. McCullough, clerk.

92 The United States of America to James P. Witherow, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2nd Monday of Oct. next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the northern division of the northern district of Alabama, in equity, wherein Sheffield Furnace Co. is appellant and you are appellee, to show cause, if any there be, why the final decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of Feb., in the year of our Lord one thousand eight hundred and eighty-nine.

[SEAL.] A. W. McCULLOUGH,
Clerk U. S. Circuit Court, Northern District of Alabama.

Allowed.
JOHN BRUCE, *Judge.*

93 On this 16th day of Feb., in the year of our Lord one thousand eight hundred and eighty-nine, personally appeared Geo. P. Turner, deputy U. S. marshal, before me, the subscriber, A. W. McCullough, clerk of the U. S. circuit court, northern district of Alabama, and makes oath that he delivered a true copy of the within citation to Lawrence Cooper, solicitor of record for James P. Witherow.

A. H. KELLER,
U. S. Marshal,
P'r GEO. P. TURNER,
Dept. U. S. M.

Sworn to and subscribed the 16th day of Feb., A. D. 1889.
A. W. McCULLOUGH,
Clerk of U. S. Circuit Court, Northern District of Alabama.

(Endorsed:) Original citation. Filed in clerk's office the 16th day of Feb., A. D. 1889. A. W. McCullough, clerk.

94 *Citation.*

By the Honorable John Bruce, one of the judges of the circuit court of the United States for the northern division of the northern district of Alabama, to James P. Witherow:

Whereas Sheffield Furnace Company has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the northern division of the northern district of the State of Alabama, made in favor of you, the said James P. Witherow, and has filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Huntsville, in the northern division of the northern district of Alabama, the fifteenth day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

JOHN BRUCE, *Judge.*

THE UNITED STATES OF AMERICA,
Northern Division of the Northern District of Alabama, } *ss:*

95 *I* Wm. B. Chambers, deputy United States marshal for the western district of Pennsylvania, being duly sworn, saith that on the 20th day of February, 1889, at Pittsburgh, Penna., he served on the above-named appellee, James P. Witherow, a copy of the appeal and a copy of the citation filed in this cause with the clerk of the circuit court in and for the northern division of the northern district — Alabama by delivering said copy of the citation to the said appellee personally and by leaving said copy of the appeal for said appellee in the clerk's office of the circuit court aforesaid.

WM. B. CHAMBERS,
Deputy U. S. Marshal, W. D. of Pa.

Sworn to this twentieth day of February, 1889, before me—
[SEAL.] W. D. GAMBLE,
Clerk U. S. Cir. C't, West. Dist. Penna.

Endorsed: Original branch. Filed in clerk's office this 15th day of February, A. D. 1889. A. W. McCullough, clerk.

96 *Assignment of Error.*

In this cause comes the appellant, by its solicitors, and says and shows that there is manifest error to its injury in the record, and for cause of error assigns the following grounds:

I. That the court erred in rendering the decree *pro confesso* against the defendant after demurrers filed to the bill of complaint in said cause and while the said demurrers remained on file in said cause, unacted upon and undisposed of by the court.

II. That the court erred in allowing the amendment in a material point by the complainant to his bill of complaint after a copy thereof had been taken out of the clerk's office by the defendant without the complainant having furnished without delay to the defendant a fair copy of said amendment, free of expense, with suitable references to the places where said amendment was to be inserted, as required by rule 28 of the rules of practice for the courts of equity of the United States, established by the Supreme Court of the United States.

III. That the court erred in rendering the final decree in said cause dated the 19th day of Dec., 1888, without any decree *pro confesso* having been rendered on the bill of complaint as amended, or after said amendment to said bill had been filed in said cause, and without said cause having been at issue after said bill of complaint was amended.

IV. That the court erred in rendering the final decree in said cause dated the 19th day of Dec., 1888.

97 V. That the court was without jurisdiction to entertain said cause as made by said bill of complaint, as originally filed or as amended.

VI. That the court erred in refusing the motion of the defendant to set aside the said final decree in said cause.

MILTON HUMES AND
ROULHAC & NATHAN,
Solicitors for Appellant.

Endorsed: Assignment of error. Filed in clerk's office Sept. the 30th, 1889. A. W. McCullough, clerk.

UNITED STATES OF AMERICA,
Northern District of Alabama, Northern Division.

I, A. W. McCullough, clerk of the circuit court of the United States of America in and for said division of said district, do hereby certify that the foregoing is a true, full, and complete transcript of the proceedings had in the cause of James P. Witherow against Sheffield Furnace Company, No. 149, as fully as the same does appear of record in my office.

Seal Circuit Court U. S., N. D. of Alabama.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the city of Huntsville, in said district, this first day of October, A. D. 1889.

A. W. McCULLOUGH,
Clerk of the U. S. Circuit Court.

Endorsed on cover: N. Alabama C. C. U. S. No. 1375. The Sheffield Furnace Company, appellant, *vs.* James P. Witherow. Filed October 16, 1889.

149 U.S. 574

Office Supreme Court, U. S.
FILED.
FEB 13 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 525.

SHEFFIELD FURNACE COMPANY, APPELLANT,

vs.

JAMES P. WITHEROW, APPELLEE.

APPEAL FROM CIRCUIT COURT OF UNITED STATES FOR THE NORTHERN DISTRICT AND NORTHERN DIVISION OF ALABAMA.

Motion by appellee in the above-stated cause to amend the record so as to have the case stand upon the docket as follows:

SHEFFIELD FURNACE COMPANY, Appellant,
vs.
JAMES P. WITHEROW, to the Use of HENRY McCORMICK, Appellee.

The appellee comes and moves the Court that the name of Henry McCormick may be added as appellee, the said James P. Witherow having made an assignment to the said Henry

McCormick since the above-stated cause was filed in this Court.

HENRY B. TOMPKINS,
Of Counsel.
WAYNE MAC VEAGH,
Of Counsel.

The above motion will be submitted to the Court three weeks after service upon counsel for Sheffield Furnace Company, to wit, on Monday, the eighth (8th) day of February, 1892.

HENRY B. TOMPKINS,
Of Counsel.

UNITED STATES OF AMERICA,
Northern District of Alabama, Northern Division, at Huntsville.

Before me, H. M. McCullough, U. S. commissioner, personally came Lawrence Cooper, Esq., of Huntsville, Alabama, who is known to me and who on oath says that he this day served a copy of the within notice and motion personally upon Milton Hume, Esq., one of counsel for the Sheffield Furnace Company, the within-named appellant.

LAWRENCE COOPER.

Sworn to and subscribed before me this 9th January, 1892.

[SEAL.] H. M. MCCULLOUGH,
U. S. Commissioner.

[Endorsed:] Mar. 7. Case No. 13,782. Supreme Court U. S., October term, 1891. Term No., 525. The Sheffield Furnace Company, app't, *vs.* Jas. P. Witherow. Motion by appellee that Henry McCormick be added as appellee, and proof of notice.

[Stamped:] Office Supreme Court U. S. Filed Feb. 13, 1892. James H. McKenney, clerk.

149255 74

FILED,
DEC 13 1889
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1889.

No. 1375.

SHEFFIELD FURNACE COMPANY, APPELLANT,

vs.

JAMES P. WITHEROW, APPELLEE.

Appeal from the Circuit Court of the United States for Northern District and Northern Division of Alabama.

MOTIONS OF APPELLEE TO DISMISS THE APPEAL; VACATE THE SUPERSEDEAS; AND AFFIRM THE DECREE.

WAYNE MacVEAGH,
HENRY B. TOMPKINS, } For Appellee.

CONSTITUTION JOB OFFICE

McCormick since the above-stated cause was filed in this Court.

HENRY B. TOMPKINS,
Of Counsel.
WAYNE MAC VEAGH,
Of Counsel.

The above motion will be submitted to the Court three weeks after service upon counsel for Sheffield Furnace Company, to wit, on Monday, the eighth (8th) day of February, 1892.

HENRY B. TOMPKINS,
Of Counsel.

UNITED STATES OF AMERICA,
Northern District of Alabama, Northern Division, at Huntsville.

Before me, H. M. McCullough, U. S. commissioner, personally came Lawrence Cooper, Esq., of Huntsville, Alabama, who is known to me and who on oath says that he this day served a copy of the within notice and motion personally upon Milton Hume, Esq., one of counsel for the Sheffield Furnace Company, the within-named appellant.

LAWRENCE COOPER.

Sworn to and subscribed before me this 9th January, 1892.
[SEAL.] H. M. MCCULLOUGH,
U. S. Commissioner.

[Endorsed:] Mar. 7. Case No. 13,782. Supreme Court U. S., October term, 1891. Term No., 525. The Sheffield Furnace Company, app't, *vs.* Jas. P. Witherow. Motion by appellee that Henry McCormick be added as appellee, and proof of notice.

[Stamped:] Office Supreme Court U. S. Filed Feb. 13, 1892. James H. McKenney, clerk.

#4925-74

FILED.
DEC 13 1889
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1889.

No. 1375.

SHEFFIELD FURNACE COMPANY, APPELLANT,

vs.

JAMES P. WITHEROW, APPELLEE.

Appeal from the Circuit Court of the United States for Northern District and Northern Division of Alabama.

MOTIONS OF APPELLEE TO DISMISS THE APPEAL; VACATE THE SUPERSEDEAS; AND AFFIRM THE DECREE.

WAYNE MacVEAGH,
HENRY B. TOMPKINS, } For Appellee.

CONSTITUTION JOB OFFICE

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IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

APPEAL FROM CIRCUIT COURT OF UNITED STATES FOR NORTHERN DISTRICT AND NORTHERN DIVISION OF ALABAMA.

No. 1375.

SHEFFIELD FURNACE COMPANY, APPELLANT.

vs.

JAMES P. WITHEROW, APPELLEE.

Motions by Appellee, in the above entitled cause, to dismiss the Appeal: Have the Supercedeas vacated: And to affirm the Decree.

THE APPELLEE MOVES THE COURT TO DISMISS THE APPEAL.

1st. Because the Court has no jurisdiction to hear and determine the cause presented by the transcript sent up in this case.

2nd. Because the bond is uncertain and defective.

3rd. Because the assignment of errors contained in the transcript of the record, shows that two separate and distinct causes are attempted to be blended and merged without any legal authority therefor.

4th. Because the transcript of the record shows that the proceedings include the pleadings, proofs and decree in an Equity cause regularly heard and determined by the said Circuit Court; and also certain other proceedings heard and determined by Hon. John Bruce, U. S. District Judge, at chambers and in vacation, and which form no part of the original Equity cause of Witherow & Sheffield Furnace Company.

5th. Because the assignment of errors, appeal papers and the certificate of the clerk do not distinguish or apply to the said Equity cause, but are all applicable to two cases, one of which is not appealable.

APPELLEE MOVES THE COURT TO VACATE THE SUPERSEDEAS.

Because the Bond, even if the word *Dollars* can be interpolated, is insufficient as a Supersedeas Bond under Rule 29, of this Court, the same not being in double the amount of the judgment or Decree.

APPELLEE MOVES THE COURT TO AFFIRM THE DECREE.

Because the Appeal is frivolous, and is manifestly taken for delay only.

Wayne McVeagh
Henry B. Tompkins

WAYNE McVEAGH,
HENRY B. TOMPKINS,
Solicitors for Appellee in the Motions.

The above motions will be submitted to the Court three weeks after service upon counsel for Sheffield Furnace Company.

Wayne McVeagh
Henry B. Tompkins

WAYNE McVEAGH,
HENRY B. TOMPKINS,
For Motions.

STATEMENT OF CASE.

On the fifth day of September, 1888, James P. Witherow filed his bill against the Sheffield Furnace Company, in which he sought to foreclose liens against a certain furnace and appurtenances, and the twenty acres of ground upon which they were situated, at Sheffield, Colbert county, Alabama.

The bill sought an enforcement in two aspects:

First. To foreclose an equitable mortgage existing under the contract made to construct a certain iron furnace, by the Sheffield Furnace Company with Witherow, which was entered into in writing on the second day of June, 1886, a copy of which contract was submitted in proof at the hearing of this cause in the court below; and which is to be found in the printed record on pages 14 and 15.

Second. It was also sought by the bill to foreclose a mechanic's lien upon the same premises, a copy of the lien proceedings as taken out under the statute and laws of Alabama being annexed to the bill as "Exhibit A," and are found in the printed record, pages 3, 4 and 5.

A subpœna was duly served upon Alfred H. Moses, President of the said Sheffield Furnace Company, on the sixth day of September, 1888, and returned into the Clerk's office on the seventh day of September, 1888. See printed record, pages 5 and 6.

No appearance was entered by solicitor or counsel for the Sheffield Furnace Company at any time; but on the third day of October, 1888, a paper was filed in the Clerk's office, purporting to be demurrers of defendant, but such paper did not have any affidavit of defendant, or certificate of counsel, as required by equity rule No. 31. See printed record, pages 7 and 8.

At the November Rules, being the fifth day and the first Monday in November, 1888, complainant, James P. Witherow, through his counsel, took a decree *pro confesso* against the Sheffield Furnace Company, there having been no appearance of counsel nor any legal demurrer entered in the cause by defendant. See printed record, page 8, M. P. 18.

On the fourteenth day of November, 1888, a paper, purporting to be an amendment to the said bill of complaint, was filed in the Clerk's office, but was afterwards withdrawn as being erroneous, no order of court having been obtained authorizing the filing thereof. See printed record, pages 9 and 10.

At the October term, 1888, of said Court, which began on the second Monday in October, and was in regular session during the month of December, James P. Witherow, through his counsel, applied to the Court, and obtained a final decree in the said cause; as is shown in the printed record, pages 10 and 11.

This final decree was granted on the nineteenth day of December, 1888, and, besides the pleadings in the cause, certain proofs were submitted to the Court, as follows:

1. The original papers, which were filed in the office of the Judge

of the Probate Court of Colbert County, by which a mechanic's or contractor's lien was established upon the furnace, appurtenances and site of twenty acres at Sheffield, and which papers were filed in said probate office on the 27th of June, 1888, and duly recorded; all of which is shown by reference to printed record, pages 11, 12 and 13.

[On this the bill was framed to enforce a mechanic's lien.]

2. A duplicate original of a written proposition and acceptance, forming the contract under which said furnace was constructed, and by which said Witherow was given an equitable mortgage upon "all the Furnace Company's interest in Sheffield." See printed record, pages 14 and 15.

[On this the bill was framed to enforce an equitable mortgage.]

3. A written proposition and acceptance made between said Witherow and said Furnace Company on the eighth day of November, 1886, by which said Witherow constructed a stock house for said furnace, which was not included in the original written agreement to build the furnace. See printed record, page 15.

4. A letter from Ogden Street, superintendent of said Defendant Furnace Company, written on the 21st of May, 1888, whereby he certified that said Witherow had complied with his contract to construct said furnace. See printed record, page 16.

5. These proofs were submitted to the Court, accompanied by the affidavit of Henry B. Tompkins, which affidavit was made on the 17th day of December, 1888, and filed in Court on the 19th day of December, 1888, and which has been left out of the transcript of record; but a certified copy or the original will be filed in the Clerk's office of this Court; and which affidavit is as follows:

In the Circuit Court of the United States for Northern District and Division of Alabama.

JAMES P. WITHEROW *vs.* THE SHEFFIELD FURNACE CO.	In Equity. Foreclosure of Contractor's Lien.

Before me, the undersigned, personally, came Henry B. Tompkins, Solicitor for the complainant, James P. Witherow, who is a non-resident, and on oath deposes and says:

1. That, as solicitor and agent for said complainant, the matters of fact set forth and alleged in the Bill of Complaint and the amendment thereto, are true.

2. That, the duplicate original of the contract between the Sheffield Furnace Company and the said James P. Witherow, as original contractor and furnace builder, was accepted and entered into, on 2d June, 1886, by Horace Ware, then President of said company, Henry B. Tompkins and Alfred H. Moses, these three forming the Executive Committee of said company; and that said Ware and Moses signed such acceptance on the 2d June, 1886, together with, and in

the presence of affiant, and also in the presence of James P. Witherow, who had then and there signed the proposition. And that the paper marked *No.* 1, and filed as proof in the above stated cause, is the original paper forming said contract between the parties.

3. That the contract between the parties by which a stock-house for the furnace of defendant was made by a letter written by said complainant on 8th October, 1886, addressed to defendant, and the proposition in which letter was duly accepted for said defendant, by its then President and Executive Officer, Horace Ware, is shown by the orignal letter forming the contract, and which said contract letter is marked *No.* 2, and filed as proof in the above stated cause.

4. That affiant was a director and member of the Executive Committee of the said defendant, the Sheffield Furnace Company, from before the 2d June, 1886, until about April, 1888; and that he knows that Ogden Street was the regularly appointed and paid Superintendent of said company; and that the signature of "Ogden Street, Superintendent," to the letter of 21st May, 1888, is genuine; and that said letter is marked *No.* 3, and filed as proof in the abovestated cause.

HENRY B. TOMPKINS.

Subscribed and sworn to before me this 17th December, 1888.

A. W. McCULLOUGH,
Clerk U. S. Cir. Court Nor. Dist. of Ala.

Endorsed: Filed in clerk's office this 19th day of December, 1888.
A. W. McCullough, *Clerk.*

SECOND.

The above constitutes a statement of all the pleadings, proceedings and proofs in the original equity cause filed by Witherow against the Sheffield Furnace Company. But on the second day of February, 1889, nearly two months after the adjournment of said court, counsel for the Sheffield Furnace Company applied to the Honorable John Bruce, United States District Judge, for leave to file what they called a petition and motion to set aside said final decree in said equity cause rendered on the 19th of December, 1888. This motion and petition of said Furnace Company embraces a long and involved statement, to which was appended as an exhibit all the proceedings and pleadings of the said original equity cause, beside other matters. These proceedings are to be found in printed record, pages 16 to 41, inclusive, and contain more than half of the whole transcript.

This motion and petition of the Sheffield Furnace Company came on to be heard and was duly argued by counsel before Judge Bruce in chambers at Montgomery, Alabama, on the fourteenth day of February, 1889, and on 15th February, 1889, the Judge granted an order refusing to set aside said final decree, which order is set forth in printed record, page 41.

A transcript of the record as sent up and certified by the clerk of the Circuit Court for the Northern District and Northern Division of Alabama, contains not only all the papers and proceedings in the original

equity cause (except the affidavit of Henry B. Tompkins, above referred to) but also contains all the papers connected with the said motion and petition of the said Sheffield Furnace Company to set aside said final decree, granted in the original equity cause of Witherow vs. Sheffield Furnace Company.

THIRD.

Upon the refusal of Judge Bruce to set aside the said original decree, the Sheffield Furnace Company, by its solicitors, proceeded to prepare appeal papers, and on pages 41 to 44 of the printed record, these appeal papers are to be found in order as follows:

(a). Prayer for an order granting an appeal, dated the fifteenth day of February, 1889, and filed in the clerk's office at Huntsville on the 16th of February, 1889.

(b). Bond of the Sheffield Furnace Company in the sum of "Twenty-five thousand" (without stating dollars or cents).

(c). Order of Judge Bruce allowing the appeal.

(d). Citation allowed by Judge Bruce, and service of the same.

Following these appeal proceedings is a paper purporting to be an assignment of errors, in which six grounds of error are set forth, the last one being, "that the Court erred in refusing the motion of the defendant to set aside the said final decree in said cause:" thus showing that counsel for the Sheffield Furnace Company considered the appeal as applying both to the original equity cause in which a final decree was rendered on nineteenth day of December, 1888, and to the motion and petition of the Sheffield Furnace Company to set aside the said decree; and which said motion and petition was denied by Judge Bruce on the fifteenth day of February, 1889. For this assignment of error, see printed record, page 45.

It also appears from the certificate of the Clerk of the Circuit Court of the United States for the Northern District and Northern Division of Alabama, that all of the proceedings, both in the original suit and in the motion and petition to set aside said final decree, are considered as forming one cause. See clerk's certificate, printed record, page 45.

BRIEF OF APPELEE UPON LAW POINTS IN THE MOTION TO DISMISS THE APPEAL; VACATE THE SUPERSEDEAS; AND AFFIRM THE DECREE.

ARGUMENT.

These motions are made under Rule 6, of this Court; the motion to affirm being joined with the motion to dismiss under subdivision five of that rule.

The practice authorized and outlined in the Alaska, 130 U. S., 201; Walston *vs.* Nevin, 128 U. S., 578; Whitney *vs.* Cook, 99 U. S., 607; Power *vs.* Baker, 112 U. S., 710, and kindred cases on the subject has been followed. Under the authorities it is well settled that, upon joining these motions, if there be color for the motion to dismiss, the Court may affirm the decree, although the motion to dismiss may be denied.

I.

The motions to dismiss the appeal and to vacate the supersedeas will first be considered.

These motions are rested upon the ground:

1*st*. *That the bond is insufficient in amount.*

A bond was entered in the sum of "twenty-five thousand." There had been a personal decree against the appellant for over sixty thousand dollars. Printed Record, pages 10 to 11.

Under Rule 29 of this Court a bond given upon an appeal from the Circuit Court must be for an amount equal to the whole decree where there has been a personal decree against the defendant, as there was in this case.

Under this rule the bond is permitted to be for less than the amount of the decree only where the property necessarily follows the event of the suit.

2nd. *That the bond is fatally defective, in that it does not stipulate any sum of money.* P. R. p. 42.

It is merely conditional for the payment of "twenty thousand." Such a paper is, of course, in law no bond, and can not be noticed as such by this Court, for it is no protection, whatever, to the appellee in case of an affirmance.

See Garrett vs. Shrove, (R. I.) 9 Atlantic R., 901; Phelps vs. Call, 7 Iredell, (N. C. Law); Carpenter vs. Sherfy, 71 Ill. 427.

Allison vs Whittier 101 NC 490 (8. S.E. 238.)

It is to be borne in mind that both the appeal to this Court and the

supersedeas being statutory remedies, they can not be obtained without a strict compliance with all the required conditions.

See Sage vs. Central Railroad Company, 93 U. S., 412, and authorities there cited; Ibid 96, U. S., 712.

3rd. *That the condition in which the record comes up presents to the Court a case calling for the exercise of its discretion by a dismissal for irregularity.*

The record, as transmitted here, contains an immense amount of matter foreign to the equity suit, in the nature of a motion and petition to Hon. John Bruce, District Judge, the object of which was to have the final decree in the equity cause, granted at the regular term of the Court, December 19th, 1888, set aside and annulled. This motion and petition was made in vacation, after the term of the Court had expired, and was refused because so made after the adjournment of the term at which the decree was rendered. P. R. p. 41. Following what purports to be the record is an assignment of errors applicable alike to the suit in equity and to the motion and petition to set aside made in vacation. P. R. pp. 44 and 45.

It will be found also, that the certificate of the Clerk is appended not only to the record of said equity cause, but also to the volume of matter called a petition and motion, with the exhibits thereto, to set aside said final decree in vacation, and to the paper designated an "assignment of error" filed in the Clerk's office on 30th September, 1889. And which certificate of the Clerk, signed on 1st November, 1889, states that all the writings are "a true, full and complete transcript of the proceedings had in the cause of Jas. P. Witherow vs. Sheffield Furnace Co., as fully as the same does appear of record in my office." P. R. p. 45.

There is no cetificate of the Clerk specially applicable to the transcript of the record of the equity cause, finally determined and decreed upon 19th December, 1888, at the regular term of the United States Circuit Court.

Only the record in said equity cause, No. 149, of Jas. P. Witherow, Compl't., vs. Sheffield Furnace Co., Defendant, can be considered by the Court on appeal.

Clark vs. Penn., 128 U. S., 395.

Hoagland Hatch, 16 N.Y. Civ. Pro. 117 - 1 N.Y. St. R. 823.

The records of two separate and distinct proceedings, being thus put together in one transcript, and to which is a common assignment of error, without any certificate of the Clerk, except as to the whole, makes in law no certificate at all, as to said equity cause above stated.

The transcript of the record as sent up from the court below, discloses that all proceedings relating to the taking of the appeal follow

after and are equally as applicable to said motion and petition of the Sheffield Furnace Company to have the decree set aside, as they are to the said equity cause itself, in which was made the decree of the Court, 19th December, 1888.

And even if this Court, as an appellate tribunal, have jurisdiction to, and will look through the record, and disengage the various matters therein set forth, and apply the appeal papers, and the Clerk's certificate, solely to the equity case, yet the above objections urged in support of the motions to dismiss the appeal and vacate the supersedeas will still apply.

If, however, the Court will not make such selections from the transcript of the record, as belong to the equity cause of Witherow vs. Sheffield Furnace Company, and apply to them the appeal papers and the assignment of errors, then this Court can only dismiss the whole surcharged and misarranged proceedings.

Whatever view the Court may take as to the right of the appellee to have this appeal dismissed, there is plainly sufficient *color* for the motion to dismiss to support the motion to affirm. Under the authorities, as shown, there was practically no bond filed, for a bond without a penalty in dollars, and without being made according to the statute and the rules of court, is in effect no bond.

There can be no appeal without the filing of a bond.

Sage *vs.* Railroad Company, 96 U. S., 712, 714; National Bank *vs.* Omaha, Id., 737.

That absence of a proper bond, and that irregularity in the record constitute sufficient color is shown by the above authorities, and also by Hinckley *vs.* Morton, 103 U. S., 764; Micas *vs.* Williams, 104 U. S., 556; the "S. C. Tryon," 105 U. S., 267.

II.

The motion to affirm.

The ground for this motion is that the appeal was taken for delay.

An affirmance is prayed with damages for delay under Supreme Court Rule 23, Sec. 2. See Whitney *vs.* Cook, 99 U. S., 607.

1. *There is on the face of the record no ground for reversal for any technical error or irregularity in the proceedings.*

The following salient facts are of record:

(a.) That there was no appearance entered by the counsel for the Sheffield Furnace Co. in the equity cause brought against it by Witherow.

(b.) That the only paper filed by the counsel for the Sheffield Furnace Company was what purported to be a demurrer, and which did not have either the affidavit of the defendant or certificate of counsel, as

provided by equity rule 31, and which was, therefore, properly disregarded by the Court as a demurrer or appearance in the case. P. R. pages 7 and 8. Nat'l B'k. v. Ins. Co. 114 U. S. 55–76.

(c.) That a decree *pro confesso* was regularly taken by Witherow against the Furnace Company. P. R. page 8.

(d.) That the papers in the record, purporting to be an amendment to the bill had been withdrawn by counsel, as shown by the endorsement thereupon. P. R. page 10.

(e.) That the decree recites all the facts necessary and proper to authorize the Court to enter up such a final decree. P. R. pages 10 and 11.

(f.) And that precaution was taken to introduce proofs to authorize the decree upon the merits; so that it was more than a decree by default for failure to appear and plead in the cause. P. R. pages 11 to 16.

Upon appeal of decree pro confesso, see Thompson v. Wooster, 114 U. S. 104

2. In so far as the contents of the demurrer and amendment to the bill are concerned, they are not evidence here, for it is well-settled that this Court will not consider any paper not used by the court below at the hearing.

Boone vs. Chiles, 10 Pet. 177.
Lessee of Reed vs. Marsh, 13 Pet. 153.
Pacific Railroad of Missouri vs. Ketchum, 95 U. S., 1.

Upon appeal from a decree rendered by default, only such defence can be set up as could have been taken advantage of by general demurrer. McAllister vs. Kuhn, 96 U. S., 87.

And a general demurrer would not lie in this case.

Livingston vs. Story, 9 Pet., 632, 658.
Griffing vs. Gibb, 2 Black, 519, 522, 523.

3. The appellant could not have objected to the bill as filed with a double aspect.

Shields vs. Barrow, 17 How., 130, 144.

Globe & Iron Co. v. Thatcher (Supr. Ct. Ala) Sou. Rep. Vol. 6 #12 Aug. 21/89 p. 366.

4. The bill as filed was not multifarious, and even if it were, the objection could not be taken in this Court.

Oliver vs. Piatt, 3 How., 333, 411, 412.
Briges vs. Sperry, 95 U. S., 401.

Said this Court, in Griffing vs. Gibb, at page 522: "The only point, in our view of the case, when it was on its hearing in the court below (on general demurrer) was whether the complainant had not shown, by the facts stated on the face of his bill, artificial as it may be in point of form, a case for relief within the jurisdiction of a court of equity." It is necessary, therefore, to test the case by this simple rule which involves an examination of the bill in support of the proposition, that:

5. *There is no ground for reversal on the merits.*

As the bill shows, the plaintiff's right was rested upon two grounds on the court below.

(a.) A written contract executed June 2d, 1886, between the parties. This provided for the erection by the plaintiff of a furnace for the defendant upon a certain site of twenty acres. In the contract it was stipulated that the plaintiff should be entitled to a first mortgage on all the property of the defendant at Sheffield, Alabama.

The decree of the court is to be supported first of all as a foreclosure of the equitable mortgage created by this contract.

The terms of the contract were that the plaintiff should be entitled to either a mechanic's lien or a first mortgage at his option. See propositions of Witherow, 22d March, 1886, and acceptance of the Sheffield Furnace Company of 2d June, 1886, found in transcript of record, pages 14 and 15. M. P. 32, as to terms of payment.

Jones vs. Lewis, Sec. 77, and notes.

Tyler vs. Jewett, 82 Ala., 100.

It is obvious from the decree itself, of 19th December, 1888, that the court meant to enforce, and did enforce, the equitable mortgage under this written contract, accepted 2d June, 1886. And this was proper.

White Water Valley Co. vs. Vallette, 21 How., 414.

The plaintiff also contended that:

(b). *Under the laws of Alabama he was entitled to enforce a contractor's lien.*

The amount due was shown by the bill to be $63,279.45, with interest.

An account was prayed, a lien asked for and a decree of sale if the premises demanded. A personal decree was also asked.

The decree established all the material allegations of the bill, and was granted as prayed.

So far as it was vested on the mechanic's lien the decree is also invulnerable. This will readily appear.

The allegations in the bill, and the exhibits annexed thereto, (other than those above referred to, relating to said written contract to give

a mortgage,) are sufficient to authorize a declaration and enforcement of a mechanic's lien, under sections 3018, *et seq.* of the Code of Alabama of 1886.

The enforcement of a mechanic's lien is a matter for equitable jurisdiction in United States Courts.

Davis vs. Alvord, 94 U. S., 545.

And this method is also expressly recognized in Alabama by Code of 1886, Vol. I, Sec. 3048.

Filing of the claim in the office of the Judge of Probate operates as a creation of a lien.

Bell vs. Teagle, 85 Ala., 207.
Vale vs. Benzen, 15 Phila., (Pa.) 180.
Myer vs. Berlandi, 40 N. W., (Minn.) 519.

A lien having attached by the filing of the claim, then a liberal construction of the method of enforcing obtains.

2 Jones on Liens, section 1556.
DeWitt vs. Smith, 63. Mo. 263.

A strict and literal compliance is not exacted, etc.

Chandler vs. Hanna, 73 Ala., 390.
Ex parte Schmidt, 62 Ala., 252.

The decree of the court below follows sections 3034–5 of the Code of Alabama of 1886, by ascertaining, first, that plaintiff had a lien as claimed, and then by giving judgment for the amount of said lien debt, with interest and costs against the party liable for the same, and then by establishing the lien and condemning specific property to sale for the satisfaction thereof.

Phillips on Mechanics' Liens, 311, 446.
Canal Co. vs. Gordon, 6 Wallace, 561.
Julien vs. Pilcher, 2 Ky., 254.

Section 3035 of the Code of Alabama of 1886 expressly provides for the rendering of judgments by default in lien proceedings.

If the decree should be impaired as to the land, for any reason, then an appellate court can modify the decree, so as to confine the lien to the furnace, or make it simply a personal decree.

Bedsole *vs.* Peters, 79 Ala., 133.

Davis v Alvord 94 U.S. 545

6. As above stated, the decree itself became two-fold in its nature: That defendant was indebted to complainant upon a personal judgment for so much money, and

That certain property, therein stated, should be subjected to the satisfaction of that decree. A personal judgment is specially provided

for under the statute laws of Alabama, enforcing mechanic's liens, and if the lien contended for against the furnace and land should fail, then the personal judgment remains, and is conclusive.

See Bedsole vs. Peters, *supra* and authorities there cited.
Steinkamper vs. McManus. 26 Mo. Appeals, 51.
Patrick vs. Abeles, 27 Mo. 184.
Mulloy vs. Laurence, 31 Mo. 583.
(Act in Alabama giving mechanic's lien, originally a copy of the Missouri law.)

The additional work of constructing stock house and putting in boiler, comes under the original agreement. Page *vs.* Betts, 17 Mo. A. 366.

And the lien is, in any event, enforceable against the furnaces, and other erections made in connection therewith, as in Alabama, under section 3034–3036 of the Code of 1886, a judgment on the foreclosure of a mechanic's lien has all the force and effect of a common law judgment.

Philips on Mechanics' Liens, Sec. 446.
Dean vs. Pyncheon, 3 Chandler, (Wis.) 9.
Blauvelt vs. Woodsworth, 31 N. Y., 285.

III.

Two minor objections that might be urged against the foreclosure as a mechanic's lien occur to be noticed.

1st. That the decree gave a lien on too much land.

2d. That the admission of proofs in the court below was irregular.

It might be said that the general lien law in existence in Alabama at the time of the enforcement of this contract required the selection of one acre before filing the claim. The answers to this objection are several.

If the decree is valid and binding as an enforcement of an equitable mortgage under the written contract of 2d June, 1886, as it clearly is, then, as has been shown, the mechanics' lien law does not necessarily enter into this cause. If it does so enter, then under the pleadings and proofs a court of equity will not require such selection of one acre in this cause, for the reason that it is shown that the furnace site comprises twenty acres of ground, upon which the furnace and appurtenant buildings were erected, and that such site was necessary for the commodious use and operation of the furnace itself. Statement in bill, printed record p. 2. M. P. 4.

Philips on Liens, Secs. 200-1-2.
Pennock vs. Hoover, 5 Rawle (Penn.), 291.
Edwards vs. Derickson, 4 Dutcher (N. J.), 39.
Gerald vs. Burch, 28 N. J. Eq., 317—468.

But the law in existence at the time of making the contract for the erection of the furnaces and the appurtenances did not impose upon the contractor the duty of selecting one acre before filing his claim. (Code of Ala., 1876, Sec. 3440, 3444). And the law in force at the time of making a contract governs as to the rights of the parties, while the law in force at the time of enforcing the lien governs as to the method of enforcement. Smith vs. Kolb 58. Ala. 535.

Philips on Liens, Sec., 24, and authorities there cited.
Turney vs. Sanders, 5 Ill., 527.
McRae vs. Craig, 23 Cal., 522.

As has been before stated, in Alabama a mechanic's lien is two-fold, (1) on the building (Code of 1886, Sec. 3018); and on the land, (Code of 1886, Sec. 3018–19), and if the decree is improvidently granted as to the land, it will be modified and enforced as to the furnace and its appurtenances.

And also, it has been shown, that in Alabama the right to sell the furnace and appurtenant erections is not taken away because the claimant may have lost his lien on the land, or because too much land claimed.

2 Jones on Liens, 1374. Lane vs. Jones, 79 Ala., 156.
Bedsole vs. Peters,79 Ala., 133; Turner vs. Robbins, 78 Ala., 592.

The complete and final answer to any objection of the above nature at this time, is that it is well settled than an allegation that a decree was given by a lower court, as to too much land, cannot be made on appeal.

Philips on Liens, Secs. 391, 388.
Derickson vs. Edwards, 5 Dutch (N. J.) 468.

The other possible objection as to admission of proofs in the court below, if made, is equally without merit.

Under rule 13 of this Court no objection can here be urged to these proofs, because their introduction was authorized by Code of Alabama, of 1886, Sec. 2770.

Pollak vs. Brush Electric Association, 128 U. S., 447.
Revised Statutes of U. S., Sec. 828.
Conn. Life Ins. Co. vs. Union Trust Co., 112 U. S., 250, 255, 256.

Kaufman v Hamburg, 128 U S. 584.

But these proofs were really submitted to and considered by the court below, accompanied with an affidavit of one of the counsel for Witherow, which is left out of the record, but a copy of which has been filed with the Clerk of this Court, and which is printed in the statement of the case on page 4 of this Brief, and the original, or a certified copy of which is filed with the Clerk of this Court.

These proofs, with the affidavit accompanying them, establish beyond the possibility of a doubt the meritorious character of the claim. And the record being without flaw, so far as its assailability here is concerned, the appellant is clearly put in the light of bringing his case here for delay.

The appellee therefore prays a dismissal or affirmance under the rule with damages.

Wayne McVeagh
Henry B. Tompkins

WAYNE McVEAGH,
HENRY B. TOMPKINS,
for Appellee.

149 US 574

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1375.

SHEFFIELD FURNACE COMPANY, APPELLANT,

vs.

JAMES P. WITHEROW, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT AND NORTHERN DIVISION OF ALABAMA.

BRIEF OF COUNSEL FOR APPELLANT ON MOTIONS TO DISMISS APPEAL, &c.

THOS. R. ROULHAC,
RICH'D W. WALKER,
For Appellant.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1375.

SHEFFIELD FURNACE COMPANY, APPELLANT,

vs.

JAMES P. WITHEROW, APPELLEE.

Appellee moves to dismiss the appeal and have the supersedeas vacated, and in support of these motions attacks the sufficiency of the appeal and supersedeas bond on these two grounds—1st, that the bond is for "twenty-five thousand," without stating dollars or cents; and, 2d, that the bond is not in double the amount of the decree.

1st. It is manifest from the order of the judge and from the recitals of the bond (Printed Record, pp. 42 and 43) that the word dollars was intended to be inserted. By usage in this country no other denomination of money is named in contracts by thousands. A mere omission of a word, or even of a clause, plainly meant to be inserted will not be permitted to defeat the intent when it can thus be distinctly ascertained.

Bishop on Contracts, § 383.

A bond given upon an injunction to a judgment for money, and in the penalty it is said "in the just and full sum of seven hundred and seventy-six, lawful money of Virginia," the word "dollars" is obviously left out by mistake, and the bond will be treated as if the word was in it.

Harman *vs.* Howe, 27 Grattan (Va.), 676, to the same effect.

Butler *vs.* Bohn, 31 Minn., 325.

Defense being made on a bill of exchange for *twenty-five* seventeen shillings and three pence on the ground that the contract did not show a promise to pay twenty-five pounds, Tindal, C. J., delivered the opinion of the court, as follows: "It must mean pounds and cannot mean anything else." This is the entire opinion.

Phipps *vs.* Tanner, 5 C. & P., 488.

The condition of a bond recited that A was indebted to B in various sums of money, which were all stated in pounds sterling and money of smaller denomination, and that the bond was given to secure payment of these sums. In the obligatory part of the bond the word *pounds* was omitted; it merely stated that the obligors were bound in 7,700, without stating the description of money: *Held*, that from the condition the intent manifestly was that the obligor should become bound in 7,700 pounds, and that the word pounds might therefore be supplied.

Cole's Adm'r *vs.* Hulme, 8 B. and C., 586.

See Rex *vs.* Post, Bayley on Bills, 8 (*n*).

The supreme court of Alabama has intimated that a mere ellipsis, even in a statute providing for the exercise of the power of eminent domain, would be supplied to give effect to the meaning plainly intended.

Faust *vs.* Mayor, 83 Ala., 283.

2d. It is contended that the bond is insufficient under rule 29 of this Court, because for less than the whole amount of the judgment or decree. That rule requires the supersedeas bond to be for the whole amount of the judgment or decree only "where the judgment or decree is for the recovery of money not otherwise secured." In suits on mortgages or where the property in controversy necessarily follows the event of the suit, indemnity is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, the costs of suit and appeal, and "just damages for delay." The bill in this case is to enforce an alleged mechanics' lien. The contract (P. R., p. 14) provided that appellee was to have either a mechanics' lien or a first mortgage on all the furnace company's interests in Sheffield.

The bill (Printed Record, pp. 1, 2, 3) shows that appellee elected to claim a mechanics' lien. On such a bill a mere personal decree for the recovery of money not otherwise secured could not be rendered, and such a decree was not rendered. The decree was for the establishment of a mechanics' lien and for the foreclosure of the same (Printed Record, pp. 10, 11). On appeal from a decree foreclosing a mortgage the amount of a supersedeas bond as well as the sufficiency of the security are matters to be determined by the judge below under the provisions of the 29th rule, and a bond for the amount of the decree is not required.

Jerome *vs.* McCarter, 21 Wall., 17.

A bill to enforce a mechanics' lien is held to be similar to a bill to foreclose a mortgage, and the decree is of like character.

Phillips on Mechanics' Lien, §§ 309 to 311.

And, as in this suit, the property in controversy necessarily follows the event of the suit, as in the foreclosure of a mortgage the indemnity required is, under the 29th rule, only such as will be sufficient to secure the sum recovered for the use and detention of the property, costs, damages, &c.

On appeal taken from a decree for the sale of property the penalty of the supersedeas bond will be little more than the interest on the debt while the sale was suspended.

Wilmer *vs.* A. & R. R. Co., 2 Woods, 147.

The bond in this case is sufficient under the rule announced in—

Gay *vs.* Parpart, 101 U. S., 391.

Babbitt *vs.* Finn, 101 U. S., 7.

But even if there was any insufficiency in the form of the bond for the purposes either of a *supersedeas* or an appeal, this would not result in the dismissal of the appeal unless the appellant should fail to comply with such conditions as the court might prescribe for the correction of the bond.

Seward *vs.* Corneau, 102 U. S., 162.

It is further contended that the appeal should be dismissed because the record contains matter that does not properly belong therein, viz., the proceedings before the judge of the circuit court on the application in vacation to set aside the decree. These proceedings were had in the same cause. Admitting, for argument's sake, that they are not necessary parts of the record, the result is that what should be in the record is here fully presented, and also matter not properly part of the record. It is not shown that this court will ignore a proper record merely because of a surplusage. The practice of the supreme court of Alabama under like circumstances is to treat matter improperly inserted in the record as if it had not been put in—to ignore the surplusage, but to consider what is properly before it.

Pinney *vs.* Werborn, 72 Ala., 58.

Weaver *vs.* Cooper, 73 Ala., 318.

This Court does not allow improper or irrelevant matter in a record to vitiate the same or prevent their considera-

tion of the cause presented, but will merely direct taxation of costs for the irrelevant matter against the party having it inserted.

Railway Co. *vs.* Stewart, 95 U. S., 279.

In French *vs.* Hay, 22 Wall., 245, '6, '9, a motion similar to the one in this record, to vacate an invalid judgment, was considered as properly in the record, and the court held that the allowance of the motion was proper.

In Pickett's Heirs *vs.* Legerwood, 7 Peters, 144, it was held that the proper method to vacate such a judgment was by motion, and it was there also held that where a judgment or decree was rendered without proper process it should be set aside on motion and might be so set aside in vacation after the final adjournment of the court. The effect of the last-named decision is recognized by this Court in Bronson *vs.* Shulten, 104 U. S., 410–416.

Under the foregoing authorities it is submitted that the proceedings before the circuit judge in vacation to set aside the decree are properly in the record and cannot be ignored, treated as irrelevant, or allowed in any manner to vitiate the record.

The ground for the motion to affirm is that the appeal was taken for delay. Appellant will not undertake, in answering this motion, to argue in detail its assignments of error, but it submits that the following obvious errors in the proceedings of the court below make it plain that the appeal is prosecuted on substantial grounds, and certainly is not frivolous:

1. The bill as originally filed asserted a builders' or mechanics' lien on property not situated in any city, town, or village (P. R., 12 and 13). By the statutes of Alabama creating such lien, which were in force when appellee's contract

was made, when the work was done, when his claim of lien was filed, and when the bill in this cause was filed, such lien operated upon an acre of ground outside of any city, town, or village (Code of Alabama, 1876, § 3440; Code of Alabama, 1886, § 3018). Summons under this bill was served upon the appellant on the 6th day of September, 1888 (P. R., 6). Previous to the 1st day of October, 1888, appellant obtained a copy of the bill (P. R., 6). On the first Monday in November, 1888, being the fifth day of said month, a decree *pro confesso* was taken on said bill (P. R., 8). On the 14th day of November, 1888, appellee amended his bill of complaint by alleging, among other things, that the twenty acres of ground which was the site of the furnace erected by him was in the city of Sheffield, and claimed a lien on the whole of said twenty acres as a single lot in said city (P. R., 9).

No copy of this amendment was furnished to appellant, as required by equity rule 28. Without any decree *pro confesso* on such amended bill a final decree was rendered on the 19th day of December, 1888, subjecting the whole of said twenty acres to the satisfaction of such lien. This decree was void, in that the appellant had not been summoned or served with process in any manner to answer said amended bill and defend against a new claim made thereby. Decrees rendered without process or contrary to the rules of practice established are void and may be set aside, upon motion, at any time.

Fellows *vs.* Hall, 3 McLean, 282.
Fellows *vs.* Hall, 3 McLean, 487.
Treadwell *vs.* Cleveland, 3 McLean, 283.
Wiggins *vs.* Gray, 24 How., 305.
Pickett's Heirs *vs.* Legerwood, 7 Peters, 144.
Hawes on Jurisdiction, § 229, note 8.
Harris *vs.* Hardeman, 14 How., 334.
Windsor *vs.* McVeigh, 93 U. S., 277.

By the rule above referred to, service of the notice of amendment therein provided for becomes process of summons by the court to answer the amended bill. Without such service the court acquires no jurisdiction, as to the matter contained in the amended bill, over the person of the defendant, and a decree against him is void.

Settlemeier *vs.* Sullivan, 97 U. S., 444.
Windsor *vs.* McVeigh, 93 U. S., *supra.*

It was necessary, before any final decree could be rendered, that the cause should be at issue. In this instance no decree *pro confesso* was rendered on the amended bill, and yet, without notice of the amendment or answer of the defendant or decree *pro confesso*, a final decree was rendered for the complainant, as prayed for in the amended bill. By rule 90 of equity rules the English chancery practice prevails in the absence of a rule established by this Court. By the English chancery practice no final decree could be rendered until the cause was at issue by the answer of the defendant or by decree *pro confesso*, if no answer was made.

1 Daniell's Chancery Practice, 403 and 523.
French *vs.* Hay, 22 Wall., 245.
Bank of U. S. *vs.* White, 8 Peters, 262.
Boyle *vs.* Zacharie, 6 Peters, 648.
Hipp *vs.* Babin, 14 How., 271.

Appellee amended his bill in a material point (as he could do, of course) after a copy had been taken by appellant (Printed Record, pp. 6 and 9). Such amendment became part of the bill. Leave of court was not required to file it (Equity Rule 28). Having thus become a part of the bill, it could not be stricken therefrom, except by order of the court. From the final decree it is shown that such decree was based on such amendment, and the property subjected is that described in the amendment and which was not described in the original bills, so far certainly as the property is shown

to be located in the city of Sheffield and that the allegation as to such location was material will be shown by authorities cited below (P. R., 9, 10, and 11). There is an indorsement by counsel for appellee upon the amendment that the same was withdrawn. There was no order of court authorizing such withdrawal and there is no certificate of the clerk showing the date of such endorsement, or that the same was filed. It appears by the certificate of the clerk of the circuit court, the original of which is filed with the clerk of this Court, and a copy whereof is immediately hereinafter set forth, that said indorsement was made without any authority whatever, after the rendition of the final decree and without even the knowledge or consent of the clerk. The following is the copy of said certificate:

"Circuit Court of the United States, Northern Division, Northern District of Alabama.

"JAMES P. WITHEROW, Complainant,
vs.
"THE SHEFFIELD FURNACE COMPANY, Defendant.

"I, A. W. McCullough, clerk of said court, do hereby certify that the endorsement on the amendment to the original bill of complaint in the above-entitled cause, which endorsement is in the following words: 'The filing of the amended bill is erroneous and the same is withdrawn, no order of court having been obtained ordering the filing thereof, signed Henry B. Tompkins, sol. for complainant,' was made thereon without my knowledge or consent and without the authority or permission of the court. I do not know when said endorsement was made, except that it was not on said amendment when the final decree in the cause was rendered, and said amendment at the time of the rendition of said decree was on file with the other papers in the cause.

"Witness my hand and the seal of said circuit court this 6th day of December, 1889.

[SEAL.] "A. W. MCCULLOUGH,
"*Clerk Circuit Court.*"

The affidavit of appellee's solicitor on page 4 of his printed brief shows beyond mistake that the amendment had not been withdrawn or attempted to be withdrawn when the final decree was rendered. The decree *pro confesso* and the final decree were not taken because of an actual default of appellant to interpose a defense below, but because his demurrers filed were not accompanied by the certificate of counsel, as required by Equity Rule 31. This was plainly a mere inadvertence of counsel, no such certificate or affidavit being required by the practice in the Alabama courts. It is submitted that the court will be loth to allow a decree obtained under such circumstances to be fortified by an attempted spoliation of the record.

2. In the bill as originally filed the property upon which a lien was claimed was not described as being in a city, town, or village. In such case the Alabama statute gives a lien only upon one acre of ground, and that one acre must be particularly described in the notice of lien required to be filed in the office of the judge of probate, and this must be shown by the pleading.

Code of Ala. 1886, §§ 3018 and 3022.
Montgomery Iron Works *vs.* Dorman, 78 Ala., 218.
Bedsole *vs.* Peters, 79 Ala., 136.

This requisition of the statute was not complied with, and for this reason the decree establishing and enforcing the lien was erroneous.

Montgomery Iron Works *vs.* Dorman, 78 Ala., 218.

3. The jurisdiction and the remedy in case of mechanics' lien, being bounded by the statute, can be pursued and exercised only before the tribunals and in the mode the statute provides. Other tribunals cannot exercise the jurisdiction without enlarging the operation of the statute.

Chandler *vs.* Hanna, 73 Ala., 392.

At the time the alleged mechanics' lien is claimed to have been acquired it could be enforced in Alabama only by an action at law, as prescribed in the statute. Courts of chancery in Alabama first acquired the right to enforce such liens by virtue of section 3048 of the Code of Alabama, 1886, which became operative December 25, 1887.

Chandler *vs.* Hanna, *supra.*

Knox *vs.* Childersburg Land Co., 86 Ala., 184.

Section 10, Code of Alabama, 1886, specially reserved all defenses existing under previous laws, and section 3048 of said Code does not purport to be retroactive in its operation.

State *vs.* McBride, 76 Ala., 57.

Robinson *vs.* Holt, Sup. C't Ala., So. Rep., March 13, 1889, page 350.

Copeland *vs.* Kehoe, 67 Ala., 598.

The Alabama statute giving the remedy by action at law to enforce a mechanics' lien, a suit in the United States court to enforce such lien must be by action at law, and an Alabama statute conferring power upon its court of chancery also to enforce such lien would not authorize a bill in equity in the United States court for such purpose, State statutes not regulating the jurisdiction or procedure of Federal courts on the equity side. The Federal court, when the right is created by State statute which prescribes the remedy, will enforce the remedy according to the State statute by action at law.

Root *vs.* Railway Co., 105 U. S., 189–212.

Hipp *vs.* Babin, 19 How., 271.

Elgee Cotton Cases, 22 Wall., 185, 186.

Willie *vs.* Yale, 1 Metc., 554; 3 Pom. Eq. Juris., §§ 1249, note 1268–'9.

Cardova *vs.* Hood, 17 Wall., 1 and 5.

Canal Co. *vs.* Gordon, 6 Wall., 568.

In Davis *vs.* Alford, 94 U. S., 546, the court holds that the mechanics' lien involved in that case was essentially a suit in equity. This was under the laws of Montana giving the mechanics' lien, but prescribing no particular court in which it was to be enforced. There were no separate courts of equity in that Territory. The lien was thus left at large and, as with respect to any other lien so situated, was enforceable in equity; but the reverse is true where the lien is not only created by statute, but a particular mode is prescribed for its enforcement. In the latter case the remedy is statutory and is deemed adequate at law, which defeats a resort to a court of equity.

Elgee Cotton Cases, *supra.*

Hipp *vs.* Babin, *supra.*

4. Appellee seeks to obviate the manifest error of the decree as a decree enforcing a mechanics' lien by claiming that the bill was also to enforce an alleged equitable mortgage. We have shown above that the scope of the bill is confined to the claim of a mechanics' lien; but, taking the bill as one to enforce an alleged equitable mortgage, and errors are apparent in the decree. A foreclosure is directed and also a personal decree rendered for the amount of the alleged debt. Prior to the adoption of equity rule 92 the circuit court of the United States could not render a personal decree at all in such case.

Orchard *vs.* Hughes, 1 Wall., 77.

Noonan *vs.* Lee, 2 Black, 499.

By said rule it is provided that in suits in equity for the foreclosure of a mortgage in the circuit court of the United States a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same. Under this rule there must be a decree for foreclosure, and a report and ascertainment of the

amount realized from the sale and of the amount of the balance, if any, remaining due before the court could render a personal decree. The course of practice to conform to the rule must be, first, a decree of foreclosure, then a sale thereunder, and, if a balance remains, the amount thereof must be ascertained and a decree rendered therefor.

Under a similar statutory provision in Alabama (Code of 1886, § 3605) the personal judgment in a suit for the enforcement of an equitable lien cannot be rendered and execution awarded until the property ordered to sale shall have been sold and the sale confirmed and the balance due ascertained by the decree of the court, and a personal decree ordering execution before such sale is erroneous.

Johnson, adm'r, *vs.* Ward, 82 Ala., 486–488.

5. A contract stipulating for a first mortgage on all the furnace company's property in Sheffield or a mechanics' lien, at Witherow's option (P. R., pp. 14 and 15), could not by itself operate as an equitable mortgage, the property not being described or ascertained, nor the exercise of the option appearing in the contract. The election would have to be made and the contract specifically enforced before there could be any mortgage, and it would have been error for the court to assume the mortgage as made and to decree the foreclosure thereof.

But it is manifest that the appellee has never occupied the place or acquired the rights of a mortgagee. It is nowhere shown that he exercised his option to receive a mortgage as his security. He filed his claim as for a mechanics' lien, and his bill is brought to enforce his mechanics' lien, and not a mortgage. He had the option which place he would fill and has elected that of the holder of a mechanics' lien.

In his motion appellant is confined to those errors which the record discloses, and cannot set up those things which

would properly be matters of defense; but it is shown in the motion that the appellant has a full and perfect defense to all and every part of appellee's claim. (P. R., p. 22.)

By the rendition of a void and unauthorized decree appellant has been prevented from heretofore making such defense. His effort to obtain the opportunity of making it cannot justly be regarded as frivolous or for delay.

THOS. R. ROULHAC and
RICH'D W. WALKER,
For Appellant.

Office Supreme Court U. S.
FILED.
FEB 13 1892
JAMES. H. McKENNEY.
CLERK.

In Supreme Court of the United States.

Sheffield Furnace Company, Appellant,

vs.

James P. Witherow, Appellee, to the use of Henry McCormick.

October Term, 1891.

No. 525.

Appeal from Circuit Court of United States for Northern District and Northern Division of Alabama.

Motions by Appellee in the above-stated Cause to Vacate Supersedeas *or for a New Bond to be given.*

The appellee comes and moves the court to vacate the *supersedeas* or for a new bond to be given, upon the following grounds:—

1. Because the bond given in said cause for *supersedeas* of decree had upon it as sureties the following-named persons, to wit: Alfred H. Moses, William B. Davidson, and O. O. Nelson.

The first named, a citizen of Alabama, residing at Sheffield, Colbert county, and the two last named, citizens of Alabama, residing at Montgomery in Montgomery county.

2. The appellee avers and shows to the court that all three of said sureties have become insolvent, as appellee is informed and believes and so charges, since the giving of said *supersedeas* bond on the 15th February, 1889.

Wherefore the said James P. Witherow, appellee, to the use of Henry McCormick, prays the Honorable Court to grant the above-stated motions.

HENBY B. TOMPKINS,
Of Counsel.
WAYNE MacVEAGH,
Of Counsel.

STATE OF PENNSYLVANIA,
WESTERN DISTRICT,
CITY OF PITTSBURGH.

Before me, the undersigned, United States Commissioner in and for said State, county, and city, personally came James P. Witherow, the appellee in the above-stated cause, who, on oath, says that the matters and things set forth in the foregoing motion are true when spoken of his own knowledge, and he believes them to be true when spoken on information and belief.

JAMES P. WITHEROW.

Affirmed to and subscribed before me, this twelfth day of November, 1891.

S. C. McCANDLESS,
United States Circuit Court Commissioner,
Western District of Pennsylvania.

[SEAL]

The above motions will be submitted to the court three weeks after service upon counsel for Sheffield Furnace Company, to wit, on Monday, the eighth day of February, 1892.

HENRY B. TOMPKINS,
Of Counsel.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ALABAMA,
NORTHERN DIVISION AT HUNTSVILLE.

Before me, H. M. McCullough, United States Commissioner, personally came Lawrence Cooper, Esq., of Huntsville, Ala., who is known to me and who in oath says that he this day served a copy of the within notices and motions personally upon Milton Humes, Esq., one of counsel for the Sheffield Furnace Company, the within-named appellant.

LAWRENCE COOPER.

Sworn to and subscribed before me, this 9th January, 1892.

H. M. MCCULLOUGH,
United States Commissioner.

[SEAL]

In the Supreme Court of the United States.

Sheffield Furnace Company, Appellant,

vs.

James P. Witherow, Appellee, to the use of Henry McCormick.

October Term, 1891.
No. 525.

Appeal from Circuit Court of the United States for the Northern District and Northern Division of Alabama

Affidavits sur *Motion for Vacation of* Supersedeas *or for the Entry of a New Bond.*

State of Alabama,
County of Montgomery.

Before me, the undersigned, personally came Henry B. Tompkins, who, being first duly sworn, deposes and says that he has made a full and thorough investigation of the financial condition of Alfred H. Moses, William B. Davidson, and O. O. Nelson, the sureties on the *supersedeas* bond given by the Sheffield Furnace Company, in the above-stated cause, now pending in the Circuit Court of the United States.

Affiant states that the said Alfred H. Moses was a member of the firm of Moses Brothers, bankers in Montgomery, Alabama, which firm failed and made an assignment some months

ago; that the affairs of said firm are now being wound up in the Chancery Court at Montgomery, Alabama, and that the said Alfred H. Moses is understood and believed to be totally insolvent.

Affiant further states that he has had a conversation with William B. Davidson in reference to his financial condition, and that the said William B. Davidson, on the second day of January, 1892, stated to affiant in the presence of Joseph M. White that he was insolvent, and that if the bonds upon which he had gone as surety other than the aforesaid *supersedeas* bond, and the claim against him should be enforced by suits now pending, that the said William B. Davidson would be unable to pay off and discharge said liabilities. The said William B. Davidson admitted to affiant that he was in embarrassed circumstances financially, and would not be able to respond upon said *supersedeas* bond if judgment should go against him upon the same.

Affiant also makes oath that he had a conversation with O. O. Nelson in relation to his financial condition on the second day of January, 1892, and that the said O. O. Nelson made to affiant substantially the same admissions as were made by the said William B. Davidson. In addition to this affiant is informed and believes that many suits against the said O. O. Nelson, involving a large amount of money, have been brought in the said Circuit Court of Montgomery County, Alabama, and that the said O. O. Nelson is totally insolvent as are the said A. H. Moses and W. B. Davidson.

Affiant further states that the said three sureties above-named, to wit, Alfred H. Moses, William B. Davidson, and O. O. Nelson have become insolvent since the giving of the said *supersedeas* bond on the 18th of February, 1889.

HENRY B. TOMPKINS.

Sworn to and subscribed before me, this the 2d of January, 1892.

L. STRAUSS,

[SEAL] *N. P., Montgomery County, Ala.*

STATE OF ALABAMA, }
MONTGOMERY COUNTY. }

Before me, the undersigned, came John D. Roquemore, who, being sworn, says that he is a resident citizen and practicing, lawyer of and in the city of Montgomery, Ala., in said State and county, and has been for the past six years; that he has no personal knowledge of the financial condition of either Alfred H. Moses, William B. Davidson, nor O. O. Nelson, except as hereinafter stated; he knows Alfred H. Moses, that he was a member of the firm of Moses Brothers, bankers in the city of Montgomery, Ala., who failed and went out of business in the month of July, 1891, that they made a general assignment on the sixth day of July, 1891, for the benefit of their creditors, and that it is generally believed and understood that said firm and the individual members thereof are insolvent. That William B. Davidson has been greatly embarrassed financially by the failure of Moses Brothers as aforesaid, and that he is of doubtful solvency. That O. O. Nelson is understood to be involved in a financial way, and that there are a great many suits against him.

JOHN D. ROQUEMORE.

Sworn to and subscribed before me, this the second day of January, 1892.

L. STRAUSS,

[SEAL] *Notary Public in and for Montgomery County, Ala.*

STATE OF ALABAMA, }
MONTGOMERY COUNTY. }

Before me, the undersigned, personally came Joseph M. White, who first being duly sworn, deposes and says that he is a resident citizen and practicing attorney in the city of Montgomery of said State and county, and has lived in said city for five years past. That he has no personal knowledge of the financial condition of either Alfred H. Moses, William B. Davidson, nor O. O. Nelson except as is hereinafter stated.

He knows Alfred H. Moses, is and was a member of the firm of Moses Brothers, bankers in the city of Montgomery, who failed and went out of business in the month of July last in a wholly insolvent condition, and that it is generally understood and believed that the said Moses is wholly and hopelessly insolvent.

That William B. Davidson is a man understood to own but small property and to be largely involved on account of liabilities growing out of his relation with said banking firm; that he admitted in witness' presence on this day to Henry B. Tompkins, that he did not have sufficient property to respond to all the liabilities now against him.

That O. O. Nelson is generally understood to be insolvent; that while he is a man of more or less property, his common and general reputation is that he is involved in an amount greatly in excess of the amount of his property, and that his property is encumbered by liens and mortgages.

J. M. WHITE.

Sworn to and signed before me, this the 2d of January, 1892.

L. STRAUSS,

[SEAL] *N. P., Montgomery County, Alabama.*